Reports of the arguments of counsel and of the opinion of the court, in the case of Commonwealth vs. Aves

CASE OF THE SLAVE-CHILD, MED.

ARGUMENTS OF COUNSEL, AND OPINION OF THE COURT, IN THE CASE OF COMMONWEALTH *vs.* AVES.

CASE OF THE SLAVE-CHILD, MED.

REPORT OF THE ARGUMENTS OF COUNSEL, AND OF THE OPINION OF THE COURT, IN THE CASE OF COMMONWEALTH vs. AVES; TRIED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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1836.

MED'S CASE.

PETITION FOR THE WRIT OF HABEAS CORPUS.

To the Honorable Justices of the Supreme Judicial Court:

The petition of Levin H. Harris, of Boston in the County of Suffolk, Mariner, respectfully represents,—That a certain female colored child named Med, of New Orleans in the State

of Louisiana, an infant under the age of twenty-one years, is now unlawfully restrained of her liberty by Thomas Aves of said Boston, Watchman.

Your petitioner represents that he has been informed and verily believes that the said Med is claimed as a slave, by — Slater of said New Orleans; that she was brought from New Orleans to said Boston by the consent of said Slater, by Mrs. Slater, his wife; that the said Aves now keeps the said Med confined in his house, No. 21, Pinckney Street, in said Boston, by the request of the said Mrs. Slater, in order that the said Mrs. Slater may carry her, the said Med back to said New Orleans, as a slave.—And your petitioner fears that the said Med, who is free by the law of Massachusetts, may be unlawfully carried back to New-Orleans, and there made a slave, unless this honorable Court will interfere for her protection.

Wherefore your petitioner prays, that your honors will grant a writ of habeas corpus, to bring the said Med before you, and to compel the said Aves to shew the cause of her detention.

Your petitioner applies in behalf of the said Med, who is about six years old, not knowing that the said Med has any relative in this place.

L. H. HARRIS.

Boston, August 16, 1836.

Commonwealth of Massachusetts.

Suffolk ss. Boston, August 16, 1836. Then personally appeared the above named Levin H. Harris, and swore that the facts stated in the foregoing petition were true to the best of his belief and knowledge:—

Before me, ELLIS GRAY LORING, Justice of the Peace.

WRIT OF HABEAS CORPUS.

Commonwealth of Massachusetts.

L.S.

To the Sheriffs of our several counties and their respective deputies, Greeting.

We command you that the body of Med, of New Orleans, in the State of Louisiana, a colored female under the age of twenty-one years, by Thomas Aves of Boston, in our County of Suffolk, Watchman, imprisoned and restrained of her liberty, as it is said, you take and have before me S. S. Wilde, a Justice of our Supreme Judicial Court, at the Court house in Boston, immediately after the receipt of this writ, to do and receive what our said Justice shall then and there consider, concerning her in this behalf; and summon the said Thomas then and there to appear before our said Justice, to shew the cause of the taking and detaining of the said Med, and have you there this writ, with your doings thereon.

Witness, S. S. Wilde at Boston, this 17th day of August, in the year, one thousand eight hundred and thirty-six.

S. S. WILDE, J. S. J. Court.

Suffolk ss. Boston, 17th August, 1836. In obedience to this writ, I have here before the Court the body of the within named Med, and haw summoned the within named Thomas Aves to appear and shew the cause of the detaining of the said Med, by reading this writ in his presence and hearing, and by giving to him in hand an attested copy thereof.

H. H. HUGGEFORD, Deputy Sheriff.

RETURN TO THE WRIT.

Commonwealth of Massachusetts.

Suffolk, ss.

August Eighteenth, A. D. 1836.

And now the said Thomas Aves makes his return of the said Writ, and states herein that he 4 has the body of the child named therein in his custody: That Samuel Slater of the City of New Orleans in the State of Louisiana, Merchant, a citizen of the said State of Louisiana, domiciled at and resident in the said City of New Orleans, on or about the first day of June in the year of our Lord one thousand eight hundred and thirty three, or at some time during that year, in the said City of New Orleans, purchased the said child and its mother as and for his Slaves, the said mother being then and there and long before that time a slave by the Laws of the said State of Louisiana, and the said child by the same Laws being then and there a slave and having been born in a state of slavery. That from and after the time when the said child was so purchased, and until on or about the first day of May now last past, the said mother and child continued and remained the slaves of the said Samuel Slater in the said City of New Orleans, and by force of the Laws of the State of Louisiana aforesaid. That on or about the day and year last aforesaid, Mary Slater, the lawful wife of the said Samuel Slater, felt the said City of New Orleans for the purpose of coming to the City of Boston in this Commonwealth and visiting the said Thomas Aves, her father, intending to return to the said City of New Orleans, and to her said husband, who remained in the said City of New Orleans, after an absence of four or five months for the purpose aforesaid. That the said mother remained behind in the said City of New Orleans, in the said state of slavery, then and still being the property of the said Samuel Slater by the Laws of the said state of Louisiana:—That the said Mary Slater brought the said child with her from the said City of New Orleans to the said City of Boston, having and retaining the said child in her custody as the agent and representative of her said husband, whose slave the said child was by the Laws of the said State of Louisiana, when the said child was brought away from the said State of Louisiana by the said Mary Slater; The object, intent and purpose of the said Mary Slater being to have the said child accompany her and

remain in her custody and under her care during her said temporary absence from the said City of New Orleans, and that the said child should return with her to the said City of New Orleans, the legal domicil of the said Mary Slater and of the said child. That the said child was confided to the custody and care of the said Thomas Aves by the said Mary Slater, to be by him kept and nurtured during the absence of the said Mary Slater from the said City of Boston for a few days, she having gone to Roxbury in the County of Norfolk, there to remain for that period on account of ill health. And the said Thomas Aves further states that by the Laws of the said State of Louisiana the marriage of a slave is in law wholly void. That this child is the daughter of a slave, born in a state of slavery, and is by force of the Laws of the same State of Louisiana a natural child. That by virtue of the same Laws of the State of Louisiana the mother of a natural child is its legal guardian; and that such right of guardianship over the infant children of a slave, where such children are not themselves slaves, devolves upon the owner of the mother of such infant children. That if the said child is by force of the Laws of Massachusetts, now emancipated and a free person, that the said Samuel Slater, as the owner of the mother of this natural child is entitled to the custody of the person of this child as its legal guardian, and that he the said Thomas Aves is the agent and legally authorised representative of the said Samuel Slater in this behalf.

And the said Thomas Aves further states that the said child is an infant of the age of six years or thereabouts and wholly incapable of taking care of herself. That it is absolutely necessary that some person should have the custody of the person of the said infant child, and the right to restrain it of its liberty. That no private person or magistrate has, by the Laws of Massachusetts, any right to take the said child out of his possession, while the said Thomas Aves continues to use that possession and custody, only for the purpose of benefiting the said child, and only restraining it of its liberty, so far as is necessary for the safety and health of the said child. That he, the said Thomas Aves, does not now, and has not at any time, restrained the said child of its liberty, in any other way, or to any greater extent, than is necessary for the health and safety of the said child.

THOS. AVES.

Suffolk ss. Aug. 18, 1836.

Sworn to before me.

BENJ'N R. CURTIS, Justice of Peace.

ARGUMENTS OF COUNSEL.

BENJAMIN R. CURTIS, ESQ., FOR THE RESPONDENT.

May it please your Honors:

In the argument which I am about to address to the Court, I shall endeavor to maintain the following proposition:

That a citizen of a slaveholding state, who comes to Massachusetts for a temporary purpose of business or pleasure, and brings his slave, as a personal attendant on his journey, may restrain that slave, for the purpose of carrying him out of the state, and returning him to the domicil of his owner.

This proposition is broad enough to cover the case before the Court. If the owner, under such circumstances, has a right to restrain his slave for the purpose of removing him to his domicil, then the custody of the respondent, in this case, is a lawful custody, and the child can not be discharged from it.

I shall make two points in support of this proposition.

I. That this child, by the laws of the State of Louisiana, is *now* a slave.

II. That the Law of Massachusetts will so far recognise and give effect to the Law of Louisiana, as to allow the master to exercise this qualified and limited power over his slave.

The first point is free from all difficulty. It is perfectly clear that this child, being a slave by the laws of the State of Louisiana, and having left that State only for a temporary purpose, is a slave *now,* by the laws of Louisiana. She has not been emancipated by coming into a state where slavery is not recognised by the Law. And the moment she returns again, either to Louisiana, or any other state or county where slavery is a legal institution, the right of the master would be recognised as still subsisting, and as having always subsisted, and would be enforced, without the least diminution on account of the temporary residence of the slave in a non-slaveholding state. We need look only to a decision of the Courts of the State of Louisiana, to be satisfied that such is the law of that State.

In a case reported in the 14 Martin's Reports 405, the question came before the Court, whether a slave, who had been removed into the North Western Territory, and *domiciled there,* was still a slave on his return to Louisiana. The North Western Territory being under the government of the celebrated ordinance of Mr. Dane, was of course a non-slaveholding territory; and the court held, that, as the slave had gained *a domicil* in that territory, he was thereby emancipated. But it is hardly possible to read the judgment of the learned Court in the case, without perceiving that their decision would have been against the freedom of the complainant, it he had gone into the Territory only for a temporary purpose. If we look at the reports of the decisions of other courts, we shall find that this very point has been repeatedly decided.

In a case reported in 2 Marshall's Kentucky Reports, 467, the Court of Appeals in Kentucky, at that time composed of some very eminent judges, decided that a slave, who was carried by his master into the North Western Territory for a temporary purpose, was still a slave on his return to Kentucky. The learned counsel on the other side may

perhaps not be inclined to give entire credit to these decisions, because they were made in slave states, but I will now refer your Honors to a decision of this point made by one of the greatest judges who ever sat on any bench in any country, and who will not be suspected of any undue bias in favor of this institution.

In the matter of the slave Grace,(1) Lord Stowell, sitting in the High Court of Admiralty, decided that Grace, a female slave, who accompanied her mistress from Antigua to England, and resided there six months, was a slave on her return to Antigua. That although the rights of the mistress over the slave were suspended, while in England, because the English Common Law provided no means at enforcing those rights, yet they existed, and might be exercised and enforced, on the return of the slave to Antigua. I have only to add to the authorities which I have cited, the fact, that I have not found any thing in the books, which at all conflicts with them, and therefore I think I was warranted in saying that in the first point there is no difficulty; that this child is *now* a slave by the law of Louisiana; and that whether the rights of the master are partially, or entirely suspended,

(1) 2 Haggard's Admiralty Reports, 94.

6 by coming into our territory, those rights are still in existence, and would be recognised and enforced by the law of the domicil of the master and the slave. I proceed therefore to consider the second point:—

That the Law of Massachusetts will so far recognise and give effect to the Law of Louisiana, as to allow the master to exercise the qualified and limited right over his slave, which is claimed in this case.

Before I proceed to discuss this question, I shall submit to your Honors, that it is competent for this Court to decide it. No *legislation* is necessary. It is the proper province of *this Court,* to determine whether any, and what effect, is to be given to the law of another state, within our own territory. I refer your Honors to Story's Conflict of Laws.
(1) The learned author is here considering how the rule as to foreign laws is to be

promulgated; whether it should be done by the Legislature, or the Judicial power. He says ‘In England and America, the Courts of Justice have hitherto exercised the same authority,’ (that is, the authority in question,) ‘in the most ample manner; and the Legislature has in no instance, (it is believed,) in either country, interfered to provide any positive regulations. The common law of both countries *has been expanded, to meet the exergencies of the times, as they have arisen;* and so far as the practice of nations, and the *jus gentium privatum,* has been supposed to furnish any general principle, it has been followed out, with a wise and manly liberality.’

(1) p. 25.

So Ch. Jus. Parker, in Blanchard v. Russell,(2) says, ‘As the laws of foreign countries are not admitted *ex proprio vigore,* but only *ex comitate,* the *judicial power* will exercise a discretion, with respect to the laws they may be called upon to sanction.’ And the same doctrine substantially, was laid down by Lord Stowell.(3)

(2) 13 Mass. Rep. 6.

(3) 2 Haggard's Con. Rep. 59.

It is clear, therefore, that it is competent for the Court to decide the question which we present to them.

I now ask your Honors' attention to what I think is the principal question in the case before you. It can not be denied, that the general principles of international law are bread enough to cover this case. I shall consider presently, whether the case comes within any exception to those general rules. What I now wish to prove is, that the case is within certain general rules, unless it is to be excepted out of them.

Slaves are looked upon in all codes, I believe, in two lights, as *persons,* and as *property.* What is the general rule of international law, applicable to them as persons? *Qualitas*

personam sicut umbra sequitur, is a rule found in all the principal writers on this branch of the law. ‘Personal capacity or incapacity, attached to a party by the law of his domicil, is deemed to exist every where, so long as his domicil remains unchanged, even in relation to transactions in a foreign country, where they might otherwise he obligatory.’(4) ‘We always import,’ (says L. Ellenborough in the case of Potter vs. Brown,)(5) ‘together with their persons, the existing relations of foreigners as between themselves, according to the laws of their respective countries, except indeed where those laws clash with the rights of our own subjects here.’

(4) Story's Conflict of Laws, 64.

(5) 5 East R. 130.

If we consider the rules applicable to slaves as the *property* of foreigners, we shall find them to be equally decisive.

Pothier, after remarking that moveable property has no locality, adds that ‘all things, which have no locality, follow the person of the owner, and are consequently governed by the law, or custom which governs his person, that is to say by the law of the place of his domicil.’ And I refer your Honors to the work which I have already so often cited, and which every one must cite who touches upon a subject which the distinguished author has treated with such learning and ability, Story's Conflict of Laws,(6) where numerous authorities on this rule are collected. I submit to your Honors that rule has a more extensive application, than merely to regulate the forms of transfer, or the order of succession to personal property. Thus to limit its effect, would be to stop far short of its real meaning, and I may add far short of the effect which it has been allowed to have. It means, that a right to a moveable thing, acquired in one country under its laws, ought not to be, and is not divested by removing that thing into another country. And here again I must refer the Court to the Commentaries on the Conflict of Laws.(7) There is another view which may be taken of this principle, by which its justice and expediency

will clearly appear. ‘Even the property of individuals,’ says Vattel(8) ‘is, in the aggregate, to be considered as the property of *the nation,* in respect to other states. It in some sort really belongs to her, from the right site has over the property of her citizens, because it constitutes a part of the sum total of her riches, and augments her power. She is interested in that property by her obligation to protect all her citizens. In short it cannot be otherwise, since nations act and treat together

(6) p. 209, 312, 218.

(7) p. 334, 335, 336.

(8) p. 168.

7 as bodies, in their quality of political societies, and are considered as so many moral persons. All those who form a society, a nation, being considered by foreign nations as constituting one whole, one single person—all their wealth together can only be considered as the wealth el that same person. Its domestic relations make no change in its rights with respect to foreigners, nor in the manner in which they ought to consider the aggregate of its property, in what way soever it is possessed.’ He then goes on, to deduce from this principle, certain rules of the law of nations, which are fairly deducible from it, and are now well settled, end among others the following. ‘The property of an individual does not cease to belong to him, on account of his being in a foreign country; it still constitutes a part of the aggregate wealth of his nation. Any power therefore, which the lord of the territory might claim over the property of a foreigner, would be equally derogatory to the rights of the individual owner and to those of the nation, of which he is s member.’ The rule on which we rely, is therefore, deducible from this great principle of the law of nations, and I need not say, that the application of this principle to the citizen of one of our sister states is, to say the least, quite as just and politic, as to the citizen of a foreign country.

I submit to the Court than, that by the general rules of international law, whether we consider this slave as a person, or as property, the rights of the master, acquired under the

law of the domicil, are to be recognised and preserved, unless there is something in this case, which excepts it out of those general rules. I proceed therefore to enquire, whether there is any exception to these rules, applicable to this case.

There are two well settled exceptions, and only two, that I have been able to discover. The foreign law is not allowed any effect:

I. When it would work injury to the state, or its citizens.

II. When the law is in itself immoral.(1)

(1) Story's Con. Laws 96. 2 Kent's Com. 39.

In the case of Greenwood vs. Curtis,(2) Ch. Jus. Parsons states these exceptions in somewhat different terms, though substantially there is no difference. He says there are two exceptions. ‘One is when the Commonwealth, or its citizens, may be injured by giving effect to a foreign law. The second is, where the giving effect to a foreign law would exhibit to our own citizens, an example pernicious and detestable.’

(2) 6 Mass. Rep. 378.

I shall endeavor to maintain that it would work no injury to the state or its citizens, to give to the law of Louisiana the qualified and limited effect which we ask tot in this case, and secondly that slavery is not immoral. Before I proceed to speak to these paints, I feel obliged to anticipate an objection, which will undoubtedly be pressed by the learned counsel for the petitioner, and which certainly comes from high authority.

‘The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions, in which law shall operate.’—Lord Mansfield, in the case of Sommersett.

It will be urged, that though we claim to exercise only a qualified and limited right over the slave, viz. the right to remove him from the state, yet, if this is allowed, all the rights of the master must be allowed. That the same foreign law, which gives the master a right to remove the slave from place to place, gives him a right to his labor, and to compel him to labor; and that if this foreign law is recognized at all, full effect must be given to it, and thus slavery will be introduced into the Commonwealth.

To this I answer:

1st. *There is no practical difficulty,* In giving this qualified effect to the Law of Louisiana. The Constitution of the United States has settled this question. That provides for and secures to the master the exercise of his right, to the precise extent claimed in this case.

2d. Neither is there any theoretical difficulty. Not to refer again to the Constitution, which being positive law, may be supposed to cut a theoretical knot, I think I can show that English Judges, since Lord Mansfield's day, have not found this difficulty insurmountable, even in regard to this very relation of slavery.

Several cases have occurred in the High Court of Admiralty in England, where ships of other nations, engaged in the slavs trade, have been captured by British cruisers, and brought in for condemnation. In the cases where the slave trade Was forbidden by the laws of the nation, to which the vessel belonged, they were condemned. In other cases, where the slave trade was lawful by the laws of the nation to which the vessel belonged, the vessel and slaves were restored to their owners. The court looked to the foreign law. If, by that law, the owners of the vessels could acquire a property in the slaves, that property was respected and the slaves were given up. Now here the relation between master and slave, which existed by the foreign law, was recognised by the English law, and effect given to it, so far as to allow 8 the owner to remove them.(1) So in the case of Madrazo v. Willes,(2) a British cruiser captured a Spanish slave ship, and the Court of Kings Bench allowed the owner to recover of the Captain £30,000 for the loss of his slaves. Here also

was a strong recognition of the relation between master and slave, and an important effect given to that relation. But I suppose that the judges who decided those cases would have been greatly surprised, if they had been told that, by recognizing the right of the master over his slave to any extent, they had in effect recognized it for all intents and purposes whatsoever; and that they had thereby introduced slavery into England. I refer the court also to the case Emerson v. Howland,(3) for a decision made in this Commonwealth, founded upon the same principles as the ease in 3 Barn. and Ald.

(1) The Amedie, 1 Acton's R. 240. Fortune, 1 Dodson 80. The Diana, 1 Dodson's R. 95. The Louis, 2 Dodson's R. 288.

(2) 3 Barnwell and Alderson, 358.

(3) 1 Mason's R. 45.

There is a decision of Chief Justice Reed of Lower Canada,(4) which throws light on this point. The case was as follows: A citizen of the State of Vermont committed a larceny there, and fled into Canada. The executive of the State of Vermont requested the Governor at that province to deliver up the fugitive. The Governor caused the thief to be arrested, and thereupon a *habeas corpus* was sued out, and the man was brought before the Chief Justice. In a very learned and elaborate opinion, the Judge decided that it was a proper exercise at the executive power, not only consistent with the laws of nations, but required by national comity, to deliver up the delinquent to the authorities of the State of Vermont. Now why did not the Chief Justice say, that the crime committed by the thief being an infringement of a foreign law, if that law was recognised at all, it must be recognised to its full extent; if any effect should be given to it, full effect must be given to it. That the State of Vermont had the same right to try, condemn and punish the thief that they had to remove him; and as the Governor of Canada could never permit the State of Vermont to exercise *all* these rights within his territory, he could not recognise their right at all, nor permit the least interference with the liberty of the fugitive, while on the

soil of Canada. I am unable to perceive why such a course of reasoning would not have been equally applicable to that case, as to the case at bar. And the answer there, as here, is, that although the rights arising under a foreign law, and properly exercisable on such foreign territory, cannot, consistently with our domestic policy, be exercised on our own territory, yet that is no reason why we should not allow the foreigner *to remove* the subject of those rights to his own territory, there to do what his law requires or allows.

(4) Reported in 1 American Jurist, 297.

The question in both cases is, whether national comity requires the nation where the subject of the rights claimed is, to allow such subject *to be removed,* and it is not at all necessary to give effect to any rights or relations, other than the right of removal, nor even to consider or take notice of any other rights or relations, except so far as they constitute or destroy a claim on the comity of the nation, to permit the removal. I submit to your Honors also, that there is no difficulty in holding that a judicial tribunal may allow a qualified effect to a foreign law. If there are considerations which forbid the court from allowing a foreign law to produce all its usual and natural effects on the relations of foreigners who coma within our territory, but, at the stone time, it will work no injury to the Commonwealth or its citizens, and will exhibit no had example, to allow some of those effects; it the doing so will, at the same time, promote harmony and good feeling, where it is extremely desirable to promote it, encourage frequent intercourse, and soften prejudices by increasing acquaintance, and tend to peace and union and good will, why should not the foreign law he allowed to have this useful and just operation within our territory? Useful, because it produces only good effects,—just, because it preserves relations acquired at home and brought here with the expectation of preserving them, and which are in no way injurious to ourselves. Such I understand to be the opinion of Mr. Justice Story. (5) ‘A State may recognise, and *modify* and *qualify* some foreign laws; it may enlarge or give universal effect to others.’ I have already shown, by citations from this book, that it is the province of the judicial power, to declare what effect a foreign law shall have, and of

course it follows that, when the learned author says a state may modify and qualify some foreign laws, he means that the judicial power of the state may do this.

(5) Confl. of Laws, 24.

I have endeavored to prove, that the qualified and limited right which we have claimed in this case, may be properly claimed and allowed, without giving full effect to the foreign law concerning master and slave; and I will now attempt to show, that to permit such an exercise of the right of the master will work no injury to the state or its citizens.

I. It will work no injury to the state, by violating 9 any public law of the state. The only law in our Statute Book, applicable to the subject of slavery, is the law against kidnapping.(1)

(1) Rev. Stats. Ch. 125, Sec. 20.

It provides that no person shall ‘without *lawful authority,* forcibly or secretly confine or imprison any other person within this state, or forcibly carry or send any such person out of thin state,’ &c. It does not define the ‘lawful authority;’ it leaves that as it found it. In short, it provides a penalty for an offence, the gist of which, depends on the Common Law; and to say that the Statute applies to this case, is the same thing as to say, that the master has no ‘lawful authority’ to confine this slave; which is the very question to be decided.

II. It will work no direct injury to the citizens of this state, for it has no direct effect on its citizens. It respects only strangers.

III. I am aware that these two divisions by no means dispose of all, or even of the principal difficulties. A state may be injured as vitally by infringements upon its public policy, as by breaches of its laws, and I shall endeavor to show that it is consistent with the public policy of Massachusetts, to permit this qualified and limited exercise of the right of the master. I know that this is a wide field; that it involves considerations so broad and deep, that I cannot hope to reach or grasp them; but while I feel confident that the court will perceive and give due weight to all these considerations, I also feel it to be my duty to suggest to

your Honors such as have occurred to my own mind. And first, I beg your Honors to bear in mind, that we are considering the policy of Massachusetts towards citizens of other states, and not towards her own citizens. Laws and institutions may exist in other states, which are inconsistent with our own policy; we cannot therefore allow our own citizens to create such institutions in our territory; we cannot permit foreigners to import them here; but, at the same time, it may be perfectly consistent with our policy not only to recognise the validity and propriety of those institutions, in the states where they exist, but even to interfere actively, to enable the citizens of those states to enjoy those institutions at home. To illustrate my meaning, suppose the province of Canada should abolish capital punishment, upon the ground that it was immoral, inexpedient, and contrary to their public policy, and a murderer should escape from Vermont into that province. The public policy of Canada in respect to capital punishment, within its own territory, would hardly furnish a sufficient reason for refusing to deliver up the murderer to the authorities of Vermont.

There is another principle, which seems to me important to be kept in view. In considering whether a stranger should be allowed to exercise this right, it is of the utmost importance to keep in view the relations between the State of which such stranger is a citizen, and our own State. A very little reflection will convince the court of the truth of this. We close our courts of justice to an alien enemy. We open them to an alien friend, for personal actions. We open them to the citizens of our sister States, in all actions. The very phrase which is made use of to express the foundation on which the admission of all foreign laws rests, illustrates this truth. National comity is that foundation. Now what may be a proper comity in one case, may by virtue of a treaty be turned into a right in another, and may be wholly done away in a third, either by a want of due comity on the other side, or in some other way. In short, it is perfectly clear, that there can be no general rule, binding in all cases, and in regard to the citizens or subjects of all foreign States, even in respect to the exercise of the same right, or the existence of the same relation. Our relations to one foreign State may render it perfectly consistent with our public policy, to permit a citizen of that particular State to do an act within our territory, which our public policy towards

another foreign State would require us to forbid its citizens from doing. What then are the relations which we sustain to the State of Louisiana, which ought to affect our public policy towards her citizens? She is not a foreign State. We are bound up with her, by the constitution, into a Union, upon the preservation of which no man doubts that our own peace and welfare depend.—Other nations may cherish friendly relations, and endeavor to promote frequent intercourse, from a fear of foreign war, or a desire of commercial prosperity. But to us these relations and this intercourse have a value and importance, which are inestimable. They are the grounds of safety for our domestic peace, and the happy institutions under which we live. Thirteen States of this Union are slaveholding States. Negro slavery has become incorporated into all their institutions. It is infused into their agriculture, their commerce, their mechanical arts, their domestic relations. Their laws and policy bear marks of it, in every line. To secure its advantages, to lessen the evils which are inseparable from it, and to avert the overwhelming destruction which it threatens, occupies the thoughts and engages the anxious solicitude of almost every man in those Staten. And great as is the importance of this institution to them, in every point of view, there can be no doubt that it occupies in their minds quite as prominent a place as it deserves. Your Honors will not forget that we are dealing 10 with this institution thus existing in our sister States, and thus deemed to be all important, and being in fact of vast importance to those States;—that we are considering, whether a citizen of one of those States, whom our interest as well as our inclination should lead us to welcome here, can be allowed, consistently with our public policy, to exercise a right growing out of this important institution, when the exercise of that right violates no public law of the State, and has no direct effect upon any citizen of the commonwealth.

I cannot but think, that the constitution itself furnishes a guide, and a safe guide, in the question. I say a guide, and not a controlling authority, for I take it to be clearly settled, that the constitution applies only to the case of fugitive slaves. But when we find that the States, in the solemn compact which they made with each other, provided for the exercise of this right in certain cases, it gives us some reason to believe that it is consistent with

the public policy of Massachusetts, to protect the right of the master to that extent, at least. I know it will be urged, that the non-slaveholding States came into this measure unwillingly, and this for the very reason that it was contrary to their policy; but unless it was on the whole consistent with their policy, it is clear they would never have come into it at all. Massachusetts undoubtedly assented to this article in the constitution, for different reasons from those which operated on South Carolina, but her reasons were sufficient; she assented to it of her own free will, and it was as much her free act, as it was the free act of any State, which came into the Union. It will be urged also, by the learned counsel for the petitioner, that although we have assented to the exercise of this right in one class of cases, yet the fact, that this limitation exists, is an argument to prove that the exercise of the right, in any other case, would be contrary to our policy. That if it was not contrary to the policy of the non-slaveholding States, to permit the master to exercise the right which we claim in this case, within their territory, we should find a provision adapted to this case in the constitution. To this argument there are several answers. In the first place, the constitution provides for that class of cases which was most important. It furnishes a remedy for an evil which had been deeply felt by the southern States, during the existence of the confederation. It is a class of cases, too, which requires the *active interposition of the law,* and the application of the civil power in aid of the master's right. It is by no means a necessary inference, that all other cases whatsoever were disregarded, or deemed to be without remedy. The slave States having procured the insertion of this provision, might be willing to leave other cases to the voluntary comity of the non-slaveholding States. On the other hand, the non-slaveholding States, though they might be unwilling to be bound through all time, and amidst all changes, to afford the aid of their civil power to enforce any right of the master in their territories, might be quite willing to accord as a favor and as a matter of comity, even mote than they were willing to surrender as a matter of right. Does not the course of legislation in some of the States prove this? Very soon alter the adoption of the constitution, four non-slaveholding States passed laws, securing to citizens of slave States, who came within their territories as travellers, and brought their slaves with them, a right to remove those slaves from the State, and return them to their domicile.(1) In other

words, the legislatures of those States secured to the master the very right which we claim in this case. It may be argued, perhaps, that the very existence of these statutes proves that some action of the legislature is necessary, and that this court is not competent to do what those legislatures have done; but if the court will examine those statutes, they will perceive why some action of the legislature was necessary there, and that the same reason does not exist in this commonwealth. In those laws, the legislatures forbid, under a penalty, the introduction of slaves into their several States. Feeling the force of the objection, that they had thus cut off almost entirely the access of citizens from the southern States, and that so to shut out those persons would be impolitic and unjust, they go on to make an exception, in favor of travellers who crime into their respective States, for temporary purposes. But in Massachusetts, there is no law forbidding the master to bring his slave here, the legislature has never acted at all on the subject, and of course it has never become necessary to introduce any such exception.

(1) 1 Rev. L. of N.Y. 657. Laws of R Island 607. Purdon's Dig. of Penn. Laws 6. Laws of N. J. 679.

I cannot but believe that these laws of Pennsylvania, New York, New Jersey, and Rhode Island, have an important bearing on this question. The legislatures of those States are the legitimate and highest authority, in regard to their public policy. What they have declared on this subject, must be deemed to be true; and where they have passed a law securing to the master the right which we claim in this case, and have continued the law to the present hour, we are not at liberty to suppose that it is contrary to *their* public policy, that the master should exercise this right within their territory. I 11 respectfully ask the court to consider what difference there is between the policy of Pennsylvania, New York, Rhode Island, and New Jersey, and the policy of Massachusetts, on the subject of slavery.

I have gone through with such suggestions, in respect to this question of public policy, as have occurred to me, and I leave it in the hands of the court.

I shall now attempt to prove that slavery is not immoral, and that to allow the master to exercise this right will not exhibit to our citizens an example pernicious and detestable. I wish not to be understood to advocate slavery, as consistent with natural right. I do not believe it to be consistent with natural right. if this cause, or any cause required me to maintain that slavery was not a violation of the law of nature, I would abandon it. But this cause does not require its advocates to do this. The terms ‘moral’ and ‘immoral’ have very wide and various meaning, and of course it is necessary to settle the meaning of this word, before we look further. I take it to be perfectly clear, that the standard of morality by which courts of justice are to be guided, is that which *the law* prescribes. Your Honors' opinion as men, or as moralists, have no bearing on the question. Your Honors are to declare what *the law* deems moral or immoral. Such was the opinion of Sir William Scott.(1) Such also was the opinion of Ch. Jus. Marshall:

(1) 2 Dodson's R. 249.

‘Whatsoever might be the answer of a moralist to the question, a jurist must search for its solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world, of which he considers himself as a part, and to whose law the appeal is made.’(2)

(2) Whea. R. 121.

The question therefore is, whether, when measured by the standard of *our law,* slavery is immoral? Upon this question, I again refer the court to the case in 3. B. & Ald 353, where the court of King's Bench allowed the owner of slaves to recover 30,000 *l.* damages, for the conversion of his property; and bearing in mind the well-settled principle, that the common law requires its suitors to come into court with clean hands, and that no man can there obtain damages, who makes rifle through an immoral act, I ask your Honors to consider, whether this decision does not prove that slavery, By the law of England, is not an immoral institution? The case of Emerson v. Howland(3) is to the same point. That was

an action on a contract based on the right of property in a slave. If the eminent Judge who decided that case had deemed slavery an immoral basis, on which to rest a contract, he would never have allowed it to be maintained. But, whatsoever may be the law of England on this subject, by the law of this commonwealth, slavery is not immoral. By the supreme law of this commonwealth, slavery is not only recognized as a valid institution, but to a certain extent is incorporated into our own law. Ch. Jus. Parker(4) says, ‘The words of the constitution were used out of delicacy, so as not to offend some in the convention, whose feelings were abhorrent to slavery; *but we there entered into an agreement that slaves should be considered as property.* ’ This court will hardly declare in this case, that slavery is immoral, and that to allow the master to exercise the right claimed would exhibit to our citizens an example pernicious and detestable, when, before you rise from your seats, you may be called upon, by the master of a fugitive slave, to grant a certificate, under the constitution, which will put the whole force of the commonwealth at his disposal, to remove his slave from our territory.

(3) 1 Mason R. 45.

(4) 2 Pick. R. 19.

If I have succeeded in convincing the court of the truth of the points which I have made, I have shown that this case is within the general principles of the law of nations; and that it does not come within any exception to those principles, and of course is to be governed by them. I now ask the attention of the court to some authorities, which bear more directly on the question before you.

The leading case on this subject is the case of the negro Sommersett.(5) In many of its leading features, it resembles the case at bar. I shall not deny that Sommersett's case settled the law of England. However contrary it may have been to the opinions of eminent common lawyers of preceding times, and to the general current of opinion and practice at that day, it has been acquiesced in, applauded, confirmed, till it would he folly to deny

that the present common law of England, in regard to slavery, is there to be found. But I think, nevertheless, that much instruction concerning this great case, and much valuable reasoning upon the subject of it, may be found in the elaborate opinion of Lord Stowell, in the matter of the slave Grace, to which I have already referral. And, though it may not convince us that Sommersett's case was decided erroneously, it will probably prevent us from being misled, by the highly figurative and declamatory language, which was indulged in by some of the eminent men concerned in that cause. If the reports of the judgment of Lord Mansfield are even tolerably

(5) 20 Howell's State Trials, 20.

12 full and correct, it is much to be regretted that we we are not permitted to see a little more fully, the grounds on which the court proceeded, and the train of reasoning by which they were brought to the decision which they made. The judgment, as reported, is singularly deficient in this respect; and feeling as we do, that it is necessary for us to distinguish the case at bar from Sommersett's case, we are not a little embarrassed, by our ignorance of these grounds and reasons. I have already had occasion to notice one expression made use of by his Lordship, in that case, and I have attempted to show, that it need not be an insurmountable obstacle here. I will now call the attention of the court to two other principles, being the only principles which I have been able to discover in the opinion.

‘Contract for sale of a slave is good here; the sale of a slave is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here, the person of the slave himself is immediately the object of the enquiry, which makes n very material difference.’ With all submission, I must confess, that I am unable to perceive the distinction. What is the subject of a contract for the ale of a slave? Is it not the person of the slave? And what is the subject of enquiry, in an action on such contract? Is it not whether the vendor sold to the purchaser the person of the slave? What was the subject of enquiry, in the action brought by the owner of slaves against the captain of the British cruiser, and reported in 3 B. & Ald.? Was it not whether the plaintiff owned the

persons of the slaves, and the defendant destroyed his property?—How then can it be said, that the person of the slave comes in question, in the one case, more than in the other?

‘The state of slavery is of such a nature, that it is incapable of being introduced on any reasons moral or political, but only by positive law.’ And again, ‘Slavery is so odious, that nothing can be suffered to support it but positive law.’ Now if by positive Jaw is meant a law enacted by the legislative power of the country, this assertion is not true in point of fact; for in all modern States, I believe, with the exception of some of the colonies of Spain, slavery has been introduced by custom, and without any action of the legislative power. Negro slaves were introduced and held, like merchandize, or any species of property, because slavery was not *forbidden* by law, and not because it was required or sanctioned by law.

If by positive law, it is meant that there must be some law of the State, which at least *permits* the master to exercise acts of ownership over the slave, this is undoubtedly true. We must find in this cue *some* law, which will permit this master to remove the slave, and it must be Massachusetts law too; but the law of Massachusetts, which we expect to find, is that principle which declares that the law of the domicil shall govern, as to the relations between foreigners, except in so far as it contradicts our own policy and laws.

If by positive law is meant a law of the State where the question arises, without reference to the law el the domicil, and that the law of the domicil cannot be, in any degree, regarded, even where the question arises between strangers, then we deny the position. We say it is not true even in England, and that the cases in which the English courts have recognized the foreigner's right of property in slaves, and given him damages for a violation of that right of property, prove that it is not the law there.

But the grounds, on which we expect to distinguish this case from Sommersett's case are, that the owner of Sommersett was a *British subject,* resident in Virginia, then a

British colony. That the question of national comity did not arise in that case. That none of the considerations, which grow out of our close and peculiar relations with the State of Louisiana, there existed. That the public policy of England, in respect to her dependent colonies, was a very different thing from the public policy of Massachusetts, in respect to her sister States. That a citizen of the State of Louisiana has a different standing in our courts, at this day, from the standing of a Virginian in the King's Bench in 1772, just before the breaking out of the revolutionary war. In short, that Sommersett's case was decided by an English court, on considerations proper to that country;—that this case is to be decided by a Massachusetts court, upon reasons proper to ourselves. And if I have succeeded in convincing the court, that it is consistent with the public policy of Massachusetts, to permit the master to exercise the right claimed in this case, I think the court can feel no difficulty in distinguishing this case ires Sommersett's case. I know not how I can better illustrate my meaning, than by supposing a case. Suppose that slavery had existed in Scotland, before the union; that it had become incorporated into all her institutions, civil, political and domestic; that it was not only of great importance to the Scottish nation, but one in which they felt an intense interest, which transcended even its real importance;—that the existence of this institution was one of the chief obstacles to a union of the two kingdoms; that its protection was provided for and guaranteed, and the faith of the English nation pledged thereto, by the act of union; that it was made the basis of taxation and representation, 13 in the imperial parliament. And then suppose that a Scottish gentleman, travelling into England with his slave, and restraining him for the purpose of carrying him back to Scotland, that slave had been brought before Lord Mansfield, on a writ of *habeas corpus.* Do your Honors believe that he would have been dismissed from the custody of his master, on the ground that slavery was so odious, that the master should not he permitted to carry his slave home, because there was no positive law of parliament providing for the case? Should we not have heard something of the act of union, of the ultimate relations between the two kingdoms; of the great importance of the institution to the sister kingdom; of the state of feeling there on the subject; of the necessity to preserve amicable feelings, and encourage intercourse between the people of the different sides of

the border? I submit to your Honors, that we should, and that the result would have been different from the result of Sommersett's case.

I now ask your Honors' attention to some authorities, in support of our view of this case.

The case of the Aurora, in 10 Wheaton, has already been referred to. In that case, a Spanish slave ship was captured on the coast of Africa, by a piratical vessel. The slaves were brought by the pirates near the coast of the United States, probably with the intention of smuggling them into some part of our country. The vessel having them on board, was seized by a public armed vessel of the U. S., and brought in for adjudication. The Spanish owner claimed the slaves, and they were restored to him by the court. Now here was a case in which the slaves came lawfully into the custody of the United States, and without any improper intervention on the part of the public armed vessel. The case seems to have been exactly parallel with the case of a cargo of slaves, cast upon our coast by a storm; and yet the court interfered actively, to restore them to their foreign owner.

A case was brought before Judge Morris, of Indiana, in 1829, in regard to the slaves of one Sewall, by *habeas corpus,* the return to which stated that Sewall was emigrating from Virginia to *Missouri,* with his family and slaves, and that his route led him through Indiana. But the evidence showed, that he was going to *settle in Illinois,* and intended to run his negroes into Missouri, for the purpose of selling them. The decision turned, therefore, on the fact, that the party had abandoned his domicil, in a State where he *could* hold slaves, and had not shown even an intention of acquiring a new domicil, in another such State; but on the contrary, so far as his intention did appear, it was to settle in a non-slaveholding State. The slaves were accordingly declared free; but the Judge expressly intimates that his decision would have been otherwise, if the domicil of the owner had continued to be in a slaveholding state. ‘By the law of nature and of nations, (see Vattel 160) and the necessary and legal consequences resulting from the civil and political relations subsisting between the citizens, as well as the States of this federative republic, I have no doubt but the citizen of a slave State has a right to pass, upon business or pleasure, through any

of the States, attended by his slaves, or servants; and while ha retains the character and rights of a citizen of a slave State, his right to reclaim his slave would be unquestioned. An escape from the attendance upon the person of his master, while on a journey through a free State, should be considered as an escape from the State where the master had a right of citizenship, and by the laws of which the service of the slave was due. It is not necessary for me to decide, whether an emigrant from one slave State to another would have the right of reclaiming his slaves, if they should escape from him while passing through our State, because that is not the case now before me. * * * The emigrant from one State to another, might be considered prospectively as the citizen or resident of the State to which he was removing; and should be protected in the enjoyment of those rights he acquired in the State from which he emigrated, and which are recognised and protected by the laws of the State to which be is going. But this right, I conceive, cannot be derived from any provision of positive law.'(1)

(1) 3 Amer. Jurist, 406.

The case in 2 Marshall's Ken. Rep., which has already been referred to, has an important bearing on this case. I have not the book at hand, but your Honors will find, on referring to it, that it contains a strong and distinct declaration of the opinion of the court, in favor of the right claimed by the respondent in this case.

These are the views entertained by the respondent's counsel, concerning this important and interesting question.

ELLIS GRAY LORING, ESQ., FOR THE PETITIONER.

May it please the Court:

I feel hound in justice to the petitioner, before proceeding to the principal points in controversy in this case, to reply very briefly to one or two suggestions, which were thrown out by the counsel fort the respondent, at the former hearing before Judge Wilde. And first,

I would say that this case has no connexion with any of the distracting questions of the day. Its discussion may lead to remarks on the moral character of the institution of slavery, but not for the objects, nor in the spirit of a party. Tho promoter of this suit is not, to my knowledge, a member of any society for the abolition of slavery.

The return to the writ shows that the mother of the child is a slave in New Orleans, and something has been said of the inhumanity of separating mother and child. It is alleged, too, that a promise has been given to the mother that her child should be returned to her. The necessity of this separation is undoubtedly a painful feature of the present case. The responsibility of it belongs, however, wholly to that odious system, which is continually breaking up the domestic ties. It is slavery and not freedom that is separating mother and child. An inveterate, deep-rooted abuse places every thing within its sphere in a false position. Any attempt to rectify it, on either a general or partial scale, produces incidental and temporary disorder. But this is no reason for standing still.

But is there really any inhumanity in making this child a free citizen of Massachusetts? is it unkindness to the child? Surely not. If she were able to form an intelligent wish, we are bound to presume she would prefer freedom to slavery. Any other supposition is a concession that the average chance for happiness and usefulness here, is less than it would be in slavery. Is it unkindness to the mother? Not if sue desires the true good of her child. No doubt she felt anxious that her daughter should be returned to her. But her apprehension was of a very different event from that we seek to bring about. The poor ignorant slave did not contemplate the possibility of her child's emancipation. Her dread was lest it might be sold on the way. When Judge Bushrod Washington,* was censured, five years since, in Niles' Register, for Iris inhumanity in selling children belonging to his plantation in Virginia, away from their parents into the slavery st the far South, the learned Judge in his public reply, addressed to a Baltimore Journal, admits the fact charged upon him, but says, ‘It is an extraordinary circumstance that so much sensibility should be felt when similar occurrences take place, in relation to this particular class of people. I may be permitted to add,’ he continues, ‘that I have never heard a sigh or a complaint from the

parents of the two most valuable servants I ever owned, that their sons had abandoned them and my service, *and sought new habitations in the Northern states, where they now are.* ' That eminent judge would have found the circumstance less 'extraordinary' if he had been placed in a similar situation, or had reflected that to a slave parent, her son's escape into a land of freedom may seem somewhat smaller occasion for a 'sigh or complaint,' than his sale into a distant and still more hopeless servitude. This child, if freed, will be educated for usefulness and respectability. She will never want a friend, nor the means of improvement and happiness. I am authorized to go further, and to say that if the claimant of this child will manumit her according to the laws of Louisiana, great as would be the peril to which she would be exposed, a friendless infant of six years old, in the midst of a slave city, that peril will be met, for the sake of placing her again in her mother's bosom. She shall be returned to New Orleans.

* [President of the American Colonization Society.— *Reporter.*]

A preliminary difficulty has been suggested by the court. It is said to be doubtful to whom the custody of the child can be committed, if she should be discharged from the present detention. It might be sufficient to reply that a decision of the court favorable to the petitioner would be equivalent to pronouncing the detention by the respondent wrongful. On the child's being discharged, the respondent would have no better right to renew the detention, than to continue it. His attempting to do so would be in contempt of the court. Any other person whatever would 3 14 have a better right than he, or those for whom he claims. The child would in fact be taken at once into the protection and keeping of the petitioner, and no practical difficulty would ensue. If, however, this course should be supposed open to objection, two alternatives present themselves. The court can either commit her to the Overseers of the Poor, who are bound to 'relieve, support and employ all poor persons residing or found in their towns, having no lawful settlement within this state,'(1) or the case may stand continued, till letters of guardianship can issue from the Probate Court. 'The Samaritan Asylum,' a well administered charity in this city, incorporated by the State for the relief of colored orphans, stands ready on her liberation,

to receive the child from the proper hands, and to give her suitable support and a good education.

(1) Mass. Rev. Stat. 371.

I have glanced at these matters, because I wished to dispose of all minor points before coming to the main question. To that question I now come.

It has been urged, then, by the counsel who has prededed me, that the citizens of the slave states of this Union, visiting Massachusetts, are to be permitted to bring their slaves with them, and to take them away on their return. Thus involving the right of exercising the relation of master and slave within this Commonwealth. And this permission to foreigners of a right not conceded to our own citizens is said to be required of us by the principles of 'the comity of nations.' My learned brother has contended that this obligation arises from the general doctrines of international law, and also from the peculiar relation existing between the members of the Union. Of these in their order.

1.—And first, I would remark that comity is not to be exercised in doubtful cases. An eminent Louisiana judge has remarked(2) 'That in the conflict of laws,it must be often a matter of doubt, which should prevail, and that whenever that doubt does exist, the court which decides will prefer the law of its own country, to that of the stranger.

(2) 17 Martin Rep. 596—Story's Confl. 29, 271.

2.—Comity is practically founded on the consent of nations and the need that is felt of reciprocal good offices. Now nothing is more certain than that no such consent of nations prevails on this subject. Mr. Hargrave asserts in his celebrated argument in Sommersett's case(3) and the assertion is fully sustained by authorities that most of the European States in which slavery is discountenanced have adopted a like policy 'to that of England, in disregarding the *lex loci* in the case of slaves,' and in giving 'immediate and entire liberty to them, when they are brought here from another country.' And the learned commentator

on American law asserts(4) that ‘there is no such thing as the admission of slaves, or slavery, in the sense of the civil law, or of the laws and usages of the West Indies, either in England *or in any part of Europe.* ’

(3) 20 How. St. Trials 61.

(4) 2 Kent Com. 203, 1st Ed.

A recent transaction which has not yet found its way into the reports of decisions, but which has occasioned too much remark not to be immediately recalled, will illustrate the policy of Great Britain on this subject. About a year since, a vessel belonging, I believe, to the regular line of Franklin & Armfield, slave traders in the District of Columbia, was on its way to Charleston in South Carolina, with its cargo of slaves. The vessel was, by stress of weather, driven into the Island of Bermuda. Immediately on her arrival the Chief Justice of the Island brought up the slaves by habeas corpus, and freed every one of them. The loss to the American owner was of seventy slaves, probably valued at fifty thousand dollars. Here is an extreme case, and yet no remonstrance has followed from the owners or from our government. It has been tacitly admitted that the well-settled policy of England in regard to slavery would make remonstrance useless. If any other species of property had been in question, we should have heard not merely of comity, but of justice and national honor. But the Bermuda case is ‘a delicate subject,’ and our government are wisely silent on it.

There is then no such consent of nations on the subject of slavery, as must form the basis of comity, if the question be considered as between foreign states. In the next place there is no room here for reciprocity. We have no slaves in Massachusetts in regard to whom we can ask the exercise of the same comity which is claimed of us for the South. Nay, the comity which is due to freemen is not extended to us by the slaveholding states. Not only is it not extended to us *in fact,* but it is not recognized as due in their statute books. Throughout the slave states color furnishes a presumption of slavery, and a free colored

citizen of Massachusetts, if found at the South, may be called co to prove affirmatively his freedom or be sold into slavery. Still more—in direct violation of the constitutional provision guaranteeing to the citizens of each state 'all privileges and immunities of citizens in the several states,' colored citizens of the North, seamen or others, are forbidden by law(5) from entering many of the Southern ports of this Union, on peril of being 'confined in jail,' till the departure of the vessel in which they arrived;—the captain to pay the jail expenses, under the penalty of one thousand dollars fine, and not less than six months imprisonment. —

(5) Laws of S. C. 1823 ch. 20—Laws of Georgia 829, ch. 68.

15 Many Southern prisons are, I doubt not, at this moment, full of tree persons of color, imprisoned under unjust laws like these I refer the court, for an exposition of this practice under the oppressive law I have cited, to the 'Memorial of forty-two masters of vessels lying in the port of Charleston, S. C.' presented to Congress Feb. 19, 1823. I have referred to these laws and usages, only as specimens of the wholesale outrage and injustice to which our own citizens are exposed, *by law,* in those parts of the country, from whence the call for comity proceeds. For further details, I refer to the 'Report' made by the Hon. Mr. Whitmarsh to the Senate of Massachusetts, at its last Session, 'on the petition of George Odiorne and others relative to certain laws(1) of several of the Southern States.' I do not limit my remarks on the want of reciprocity, to the State of Louisiana alone, because it is obvious that if we are to permit slavery here, through comity, that comity cannot be limited to Louisiana slave-masters alone. We must settle our new Massachusetts Slave Code for all slaveholders at once, from which ever of the twelve slave States they come. Twelve degrees of comity would be intolerable. The whole South are identified in policy on this subject, and I feel that I do enough, in showing that in the slave-portions of our country, generally, no adequate respect is shown to the rights of our free citizens.

(1) See Prince's Dig. of Laws of Georgia 465, 467—Laws of N. C. 1830 ch. 30, ch. 981, 1826 ch 21, p. 684 ch. 362—Mississippi Rev. Code p. 387 § 80, 377 § 34 Virg. Laws 1830 ch. 39—S. C. Laws 1820, p. 22, 1823 p. 61—Virg. Rev. Code p. 428 § 30—1. Martin Dig.

678—and see especially the Act of the Legislature of Georgia, approved by the Governor Dec. 26, 1831, and still in force, offering a reward of five thousand dollars for the abduction of the editor or publisher ‘of a certain newspaper called the Liberator, published in the town of Boston and State of Massachusetts.

Suppose instead of a colored child, this were the case era white slave, brought to our shores by a Russian or Turkish noble.(2) Could we listen to the claim of either of those ‘ancient and faithful allies of the U. S.,’ asking to retain his despotic authority over our fair skinned fellow creature pleading for freedom? The proposition would be thought at once ludicrous and horrible. It would not be tolerated one moment. But white, or black skins are nothing here—this tribunal, like a greater, is no respecter of persons.

(2) Story Confl. 92.

3.—I remark in the third place, that there is no room for comity where the subject has been matter of express regulation. The constitution of the U. S. undertakes to settle, as between the States, the questions growing out of slavery. The right of the master to reclaim his slave who *escapes* from the State, where he is held to service, is clearly established. My learned brother admits that this is not the case of an *escape,* and that the express provision of the constitution respecting fugitives, is not applicable to it. He contends that the class of cases like that before us, was left to the comity, which was to be looked for between the States. But had the Southern States any right to expect the comity now claimed? So far from it, that, according to the learned commentator on the constitution, ‘the want of such a provision under the confederation, (as that for the return of fugitive slaves) was felt as a grievous inconvenience by the slaveholding States,—since in many states no aid whatsoever would be allowed to the owners; end sometimes indeed they met with open resistance.’ Now how did it happen, I ask, that the Southern framers of the constitution, after this experience, left a doubtful point, like the present, to be settled by uncertain considerations of comity, while they guarded with such jealous care an apparently far stronger case of right? Why not leave the whole to comity? Where a

slave, escaping from bondage, flies to this State, and the master follows in hot pursuit, his right to reclaim the fugitive certainly seems far clearer than where he voluntarily brings his slave among us. Yet the latter case is left out of the constitution, while the former is most carefully guarded.(3)

(3) It is no reply to this argument to say, as my brother who argued for the master has done, that the case of slaves *escaping* from other States, was expressly provided for in the constitution because *there* the *active* interposition of the State authorities is required. The case of a slave who comes here by hie master's consent and then refuses to return, presents precisely the same necessity tot our active interposition, as the case of a fugitive.

4.—If the doctrine of comity is not applicable, where the rustier has been the subject of positive regulations, still less is it admissible when those regulations are the result of mutual concessions, after long dispute and difficulty. But this is precisely the history of our constitution. It is called ‘a compact,’ ‘a compromise.’(4) —Is it a written compact? Then we are not to vary or control it by parol. No principle of law rests on a stronger basis of sound sense than this. Is it a compromise? Then you may be sure it was carefully penned. A compromise imports a mutual surrender of rights, interests, or prejudices. Unquestionably, then, the instrument contains all that was surrendered. We are not to be told that some of our principles were yielded up by compromise, and the rest are to be sacrificed to comity. The extent of the surrender is limited by the terrors of the contract.—Each party said to the other ‘Thus far shalt thou come, and no further!’

(4) 2 Pick. Rep. 19.

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It is well known that when our State Convention was deliberating on the adoption of the constitution of the U. S., one of the most serious arguments urged against it was that some of its provisions recognized slavery. Suppose the objectors had been told ‘You not only concede so much to the slaveholder by the terms of the constitution,—but there is

something beyond, left unsettled. So far, you go by compact,—and something further—indeed nobody knows exactly how far—you go by comity. Certain other undefinable rights are to be ‘thrown in,’ such as the right of the slaveholder to come into the free States, and there to carry about and manage his ‘peculiar property,’ where and how he pleases.’ Our Massachusetts fathers were a sturdy, business-like set of men—and a pretension like this, if gravely put forward, would have proved a great, if not insurmountable objection to the new constitution. The constitution undoubtedly expressed the meaning of the parties, and it expressed their whole meaning.

5.—Another view may be found worthy of a passing notice. The application of the law of the foreign domicil will be found to be chiefly confined to cases of mere contract. In respect to the domestic relations, comity cannot be allowed so wide a range. The affections and duties belonging to those relations glee more than any thing else, character and individuality to a people; and their condition and regulation mark the progress of a people in civilization, far more than their laws of contract. A Mansfield may produce a mercantile code for the world, out of the stores of learning and wisdom in his own great mind:—a Huskisson may remodel the commercial system of his nation;—but it is only Time, the innovator, that can bind or loose the ties around the homes and hearts of a people. Hence the slowness and difficulty with which foreign laws and usages on these subjects are allowed to intermingle with domestic habits and prejudices. Indeed any considerable variation from our particular mode of sustaining the domestic relations, is punishable as a public offence. Take the case of marriage. Marriage is a contract, and therefore the *lex loci contractus* is permitted to decide what constitutes a marriage, but as it is a domestic bond, the same law cannot be allowed to regulate its rights and duties. We have a tradition that Judge Buller ruled in flavor of the husband's right to administer correction to his wife, by beating If such were the law of England could an English husband visiting this country be allowed to exercise such authority here? May a travelling Turk bring with him his hundred wives? Might a Hindoo wife he immolated here, on her husband's funeral pile? Consider, too, the parental relation. Child-murder was lawful in the ancient world. It is so still in China

and the South Sea. But here, even the much less severe exercises of parental authority, allowed over half Christendom, would not be tolerated. Suppose a foreign guardian and ward to visit Massachusetts—no circumstance would justify his introducing here the barbarous incidents of the feudal wardship. And so, too, we acknowledge the relation of master and servant, when it is founded on mutual advantage,—but we cannot voluntarily recognize it in the form of slavery, in which the benefit is all on one side. It is evident that such violations of right as those I have instanced, are more readily condemned than immoralities which do not touch the domestic connexions.

I offer these preliminary suggestions as general cautions in respect to the admission of the principle el comity. I proceed next to enumerate the exceptions laid down by legal text writers, to the general admissibility of the *lex loci,* with a view to ascertain whether the present case does not fall within one or more of those exceptions.

It is laid down on the highest authority, as ‘a necessary exception to the universality of the rule [of comity,] that no people are bound to enforce or hold valid in their courts of justice, any contract [or law,] which’—1.—‘offends their morals,—or,2.—contravenes their policy—or, 3.—violates a public law’(1) —or, 4.—which offers a pernicious example.(2)

(1) 2 Kent Com. 457—Story Confl. 95.

(2) 6 Mass. Rep. 858.

1.—Slavery is within the first exception. It is offensive to morals.

In going somewhat at large into the moral character of slavery, as I here feel it my duty to do, I have been met by the objection, that the morality of this or of any other institution can only be estimated in a court of law, by a legal standard. I admit the position fully. I only deny its application. The case now before the court is one of novel impression In Massachusetts. Slavery has never, till now, appeared in this guise before our judicial tribunals, and its character, in this particular aspect, remains yet to be settled. To a certain

extent and in a special class of cases, I may be estopped by the constitution of the U. S., as my brother opposite has assumed, from asserting the immorality of slavery—but when the question is, whether the slave system shall be carried to a greater extent than heretofore, and to a new case, not touched, as I believe, by the constitution, the enquiry as to the general tendency and abstract character of that system becomes material. Repeating, therefore, that I am now treating the question as one of general international law, and deferring to a subsequent stage in my remarks the discussion of its constitutional bearing, I ask the indulgence of the court while I endeavor 17 or to show, chiefly by way of authority, the immorality of slavery.

The testimony of Ethical writers against slavery is unanimous and decisive. I refer, however, to but a single text book, the latest and perhaps the most satisfactory which has yet appeared. President Wayland says(1) of slavery—'Its effects must be disastrous upon the morals of both parties. By presenting objects on whom passion can he satiated without resistance and without redress, it cultivates in the master, pride, anger, cruelty, selfishness and licentiousness. By accustoming the slave to subject his moral principles to the will of another, it tends to abolish in him all moral distinction, and thus fosters in him, lying, deceit, hypocrisy, dishonesty, and a willingness to yield himself up to minister to the appetites of his master.'

(1) Wayland's Elements of Moral Science, 209.

Writers on natural law are equally clear. Slavery is condemned by its very definition. Grotius call it(2) 'An obligation to give all our labor for a supply of the bare necessities of life.' This definition is however, as Rutherforth has remarked,(3) too restricted, as the power of the master applies not only to the slave's labor, but to all his other actions. In distinguishing the authority of a parent from that of a master, this author says(4) —

(2) Grot. Lib. Cap. 5 § 27.

(3) Instit. Nat. Law, Book 1, chap. 20.

(4) Ibid.

‘The good of the child is the end to which the authority of the parent over the child is directed; and the good of the master is the end to which the authority of the master over the slave is directed. The parent has no right to command the child, but in view to the benefit of the child itself; the master has a right to command the slave to do such actions as are tot the master's benefit: so that however the slave may find his account in obeying his master's commands, this is merely accidental; since the master's right to give these commands has another purpose principally in view.’

It requires indeed but a short course of reasoning to show the inherent selfishness and injustice of slavery. Elementary writers illustrate the origin of property by saying that when one savage has plucked a cocoanut from the tree, no other savage can wrest it from his hands, without a perception of injustice arising. The moral instinct speaks out at once. But what else is slavery, than a regular system by which one man is all his life compelled to pluck cocoa-nuts that another may eat them?

The most eminent Statesmen of the South have concurred with the moralist and the civilian on this subject.(5) I shall not press their evidence upon the court, though they are witnesses to this point, of the highest credibility. Indeed on a question of general morals rather than of municipal or local law, a far wider range might be taken than I shall permit to myself now. The prevailing tone of literature respecting slavery, and the general sense and judgment of the majority of the civilized world, are clear and competent evidence in my favor. But I pass from these to enquire what view is taken of the moral character of slavery, by the authoritative expounders of our law. The case of Sommersett, decided in 1772, was mainly argued and determined on the ground of slavery's being corrupt and immoral. The air of England was declared to be too pure for slaves to breathe in. This principle has been recognized in numerous English cases since, and very recently, in the

case of Forbes v Cochrane,(6) where it was decided by the Court of King's Bench, that thirty-eight slaves, who had escaped from a plantation in East Florida, to an English ship of war on the high seas, became hereby free. The noble opinion of Sir William Best, in that case, does him equal honor as a lawyer and a man. He does not hesitate to stigmatize the British toleration of Slavery in their West India possessions

(5) Take as specimens the following:—

‘Is it not amazing, that at a time when the rights of humanity are defined with precision, in a country above all others fond of liberty, that in such an age, and in such a country, we find men, professing a religion the most humane and gentle, adopting a principle as repugnant to humanity, as it is inconsistent with the Bible, and destructive to liberty?’— *Patrick Henry.*

‘Iniquitous and most dishonorable to Maryland, is that dreary system of partial bondage, which her laws have hitherto supported with a solicitude worthy of a better object, and her citizens by their practice countenanced.

‘Founded in a disgraceful traffic, to which the parent country lent her fostering aid, from motives of interest, but which even she would have disdained to encourage, had England been the destined mart of such inhuman merchandise, *its continuance is as shameful as its origin.—Wm. Pinckney's Speech in the Maryland House of Delegates.*

‘With what execration should the statesman be loaded, who, permitting one half of the citizens to trample on the rights of the other, transforms those into despots, and these into enemies; destroys the morals of one part, and the *amor patriæ* of the other.

‘And can the liberties of the nation be thought secure, when we have refused the only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed, I tremble for my country, when I recollect that God is just; that his justice cannot sleep forever; that, considering numbers, nature and natural means only, a revolution in the wheel of fortune, an exchange

of situation is among possible events; and that it may become probable by a supernatural interference. The Almighty has no attribute which can take side with us in such a contest.'— *Jefferson's Notes on Virginia.*

(6) 2 Barn. and Cressw. 458—3 Dowl. and Ryl. 698. S.C.

18 as 'the crime of the nation,' and denounces the law recognizing slavery as 'an unchristian law, and one which violates the rights of nature, and therefore not to be recognized here.' 'The proceedings in our Courts,' says that eminent Judge, 'are founded upon the law of England, and that law is again founded on the law of nature and the revealed law of God. If the right sought to be enforced, is inconsistent with either of these, the English Municipal Courts cannot recognize it.' It appears that the foreign Admiralty cases read by my brother on the other side, were cited and commented on in that case. After solemn argument, the opinion of the court in favor of freedom was unanimous.

These are foreign authorities, and relate to foreign servitude. Before looking for the lights of our own jurisprudence on the subject, I ask leave to define, in a more especial manner, what is Slavery, as it exists among us.

For this purpose, I shall read from 'Stroud's Sketch of the Laws relating to Slavery,' (an accurate and valuable compendium) the following propositions, describing the incidents of American Slavery. For the most ample proof of each, I refer to the work itself, where the codes, statutes, judicial decisions, &c. of the several States, on Slavery, are digested.

'Prop. 1. The master may determine the kind and degree, and time of labor, to which the slave shall be subjected.

'Prop. 2. The master may supply the slave with such food dud clothing only, both as to quantity and quality, as he may think proper or find convenient.

‘Prop. 3. The master may, at his discretion, inflict any punishment upon the person of his slave.

‘Prop. 4. All the power of the master over his his slave may be exercised not by himself only in person, but by anyone whom he may depute as his agent.

‘Prop. 5. Slaves have no legal fights of property in things, real or personal; hut whatever they may acquire, belongs, in point of laws to their masters.

‘Prop. 6. The slave being a personal chattel, is at all times liable to be sold absolutely, or mortgaged or leased at the will of his master.

‘Prop. 7. He may also be sold by process of law for the satisfaction of the debts of a living, or the debts and bequests of a deceased master, at the suit of creditors or legatees.

‘Prop. 8. A slave cannot be a party before a judicial tribunal, in any species of action, against his master, no matter how atrocious may have been the injury received from him.

‘Prop. 9. Slaves cannot redeem themselves, nor obtain a change of masters, though cruel treatment may have rendered such change necessary for their personal safety.

‘Prop. 10. Slaves being objects of *property,* if injured by third persons, their owners may bring suit, and recover damages for the injury.

‘Prop. 11. Slaves can make no contract.

‘Prop. 12. Slavery is hereditary and perpetual.’

I hold in my hand another brief delineation of American Slavery. It is accurate and most expressive, but its plainness of speech is so remarkable, that I hesitate to read its before I shall have premised the its author is the Ray. Robert J. Breckinridge, a southern clergyman of great eminence, at this momenta representative from the Presbyterian

churches of the United States to those of England and Scotland but perhaps principally distinguished as an uncompromising opponent of the Immediate Abolitionists. It a speech delivered by Mr. B., he asks:

‘What, then, is slavery? for the question relates to the action of certain principles on it, and to its probable and proper results; what is slavery as it exists among us? We reply, it is that condition enforced by the laws of one-half the States of this confederacy, in which one portion of the community, called masters, is allowed such power over another portion called slaves; as

‘1. To deprive them of the entire earnings of their labor, except only so much as is necessary to continue labor itself, by continuing heathful existence; thus committing clear robbery;

‘2. To reduce them to the necessity of universal concubinage, by denying to them the civil rights of marriage; thus breaking up the dearest relations of life, and encouraging universal prostitution;

‘3. To deprive them of the means and and opportunities of moral and intellectual culture —in many States making it a high penal offence to teach them to read; thus perpetuating whatever of evil there is that proceeds from ignorance;

‘4. To set up between parents and their children an authority higher than the impulse of nature and the laws of God; which breaks up the authority of the father over his own offspring, and, at pleasure separates the mother at a returnless distance from her child; thus abrogating the clearest laws of nature; thus outraging all decency and justice, and degrading and oppressing thousands upon thousands of beings created like themselves in the image of the most high God!

‘This is slavery as it is daily exhibited in every slave State.’

I give lastly, the concise and comprehensive definition of a Slave, contained in the Louisiana Code, as the most pertinent to the present stage of our enquiry, and as exceeding all others ever framed for affecting the entire privation of all rights.

‘A slave issue who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry and his labor: he can do nothing, possess nothing, nor acquire any thing but what must belong to his master.’(1)

(1) Civil Codes Art. 35.

The moral judgment which the laws of Massachusetts passed on this system was early and decisive. Not to go back of the Declaration of Rights, at present, the people of Massachusetts, in the year 1780, declared through their organic law, that ‘All men are born free and equal, and have certain natural, essential, and inalienable rights, among which may be reckoned the rights of enjoying and defending their lives and liberties; that of acquiring ‘possessing 19 and protecting property; in fine, that of seeking and obtaining safety and happiness.’

Observe that the Constitution goes on the moral ground. Liberty is a ‘natural right.’ Slavery then is a violation of the law of nature. And what is the law of nature? It is synonymous with the law of God, and comprises ‘those rules of justice, which ought to govern the conduct of men, as moral and accountable beings, living in a social state, independently of positive human institutions’(1) But the Constitution further declares Liberty to be an ‘essential right.’ Then is slavery *essential wrong* —concentrated injustice. Again,—Men are born free—and freedom is ‘inalienable’—must it not then be a part of their moral being?

(1) Wheat. Internat. Law, 36.

The cases of Winchendon v. Hatfield(2) and of Greenwood v. Curtis, with the brief reports of elder decisions contained in the notes to the former case, abundantly confirm my position that Slavery was abolished in Massachusetts, from a conviction of its immoral

nature. From the opinion of Judge Sedgwick(3) in Greenwood v. Curtis, I will read a single paragraph:

(2) 4 Mass. Rep. 128.

(3) 6 Mass. Rep. 366. This case was decided by the rest of the Court, contrary to Judge Sedgwick's opinion;—but not on grounds impeaching his main principle,—the immorality of the slave trade. They held that the contract could be analyzed, and the sound part separated from those which were infected by the immorality of the trade.—See praise of Sedgwick's opinion,—Story, Confl. 215 in note.

‘The previous question, whether such a contract as this under consideration be immoral, unrighteous, irreligious,—whether the execution of such a contract be consistent with the rights of our fellow men, or with the duty we owe to our God,—will not be made the subject of an argument. So strong and so natural is the abhorrence of slavery, in the heart era man unpolluted by its practice; so opposed to the just principles on which our revolution was founded; and so contrary to the mild, merciful, and benignant dictates of the holy religion we profess; that a labored discussion of the question is deemed to be superfluous.’

Reluctant as I feel to touch the confines of theological discussion, I cannot excuse myself, in closing these remarks on the moral character of slavery, from a brief allusion to the opinion which has sometimes been held, that slavery has the sanction of revealed religion in its favor. So deeply responsible do I feel to the sacred cause I plead, that I dare not withhold any argument, which carries force to my own mind.

Slavery was permitted or appointed by the Deity, under the elder dispensation, expressly as a punishment upon certain conquered nations, for their idolatry and other crimes. It was ordained as a national judgment, in the same manner as the utter and pitiless extermination of every breathing thing was commanded in the case of some of the captured cities of Canaan. When the slavery of the blacks can plead either a like origin or a similar divine commission, it may with more confidence, plead in justification the example

of the Jews. Unfortunately it is not more deficient in these, than in the mild and merciful regulations, that mitigated the harshness of Hebrew servitude. Gross cruelty towards a slave entitled him to freedom.(4) Perpetual slavery was unknown;—all slaves without exception being set free at the jubilee or fiftieth year.(5)

(4) Exodus, Ch. 21, v. 26, 27.

(5) 15 Deut. 12—14,—25 Levit. 8—10.—In a debate on the Slave Trade, in the House of Lords, June 24, 1806, the celebrated Bishop Horsley, in reply to the Earl of Westmoreland, said 'The noble Earl has produced to your Lordships a passage in the Levitical Law, which enacts that the foreign slave should be the property of his master *forever.* Whence the noble Earl concludes, that the perpetual servitude of foreign slaves was actually sanctioned by the law. But, my Lords, I must tell the noble Earl, and I must tell your Lordships, that the noble Earl has no understanding at all of the technical terms of the Jewish Law. In all the laws relating to the transfer of property, the words *for ever,* sightly only *to the next jubilee.* That is the longest *forever,* which the Jewish law knows, with respect to property. And this law, which makes the foreign slave the property, of his master forever, makes him no longer the master's property than to the next jubilee. And, with the great attention the noble Earl has given to the laws and history of the Jews, he must know, that when they were carried into captivity, they were told by their prophets, that one of the crimes, which drew down that judgment upon them, was their gross neglect and violation of these merciful laws respecting manumission; and that in contempt and defiance of the law, it had been their practice to hold their foreign slaves in servitude, beyond the year of jubilee.'—20 Howell's State Trials, 32 note.

Finding in the records of Christianity no direct denunciation of slavery in terms, we are sometimes told that Christianity does not condemn it. This arises from a misapprehension of the business of Christianity—Christianity does not so much claim to be a body of ordinances, as a quickening spirit. It came not to attack particular forms of evil but to proclaim corrective principles. It generally does not so much as name the vicious

institutions of its time, for it was designed to outlive even the memory of them.(6) The founder of our religion built for Eternity. He rarely touched the political or social arrangements of his own day, but tie set in motion influences which will be felt forever and which must ultimately overthrow every form of vice and oppression on earth. His religion prostrates human selfishness, in enjoining us to do to others as we would have them do to us: and subverts political and personal slavery by teaching the

(6) See Wayland's Remarks—Elem. Mor. Sci. 213.

20 brotherhood of men. If however its author's main purpose had been to abolish slavery, I know not how he could have described his mission in more significant terms, than by declaring, at the very opening of his ministry, that he came to preach the gospel to the poor,(1) liberty them that are bruised.

(1) To two millions of whom, the Gospel is, in this country, practically denied. The official report of the Presbyterian Synod of South Carolina and Georgia, published March 22, 1834, contains the following statements—.'In this Christian Republic, there are over two millions of human beings, in the condition of Heathen, and in some respects in a worse condition. Their moral and religious condition is such, as that they may justly be considered the heathen of this Christian country, *and will bear comparison with heathen in any country in the world.* The negroes are destitute of the privileges of the gospel, and ever will be under the present state of things.'

Slavery then is contrary to good morals;—a violation of the law of nature, and of the revealed will of God. It therefore falls within the first exception to the exercise of national comity.

2. But it is also within the second exception. It contravenes our policy. If the slave system of Louisiana is to be introduced here, in the most limited extent, it wilt be an entire novelty among us. Massachusetts has known nothing like it. The slavery that was abolished here nearly sixty years since, resembled little more than in name, the hard bondage of the

South. In the Massachusetts Colony, as early as 1641, ‘it is ordered by the Court and the authority thereof, that there shall never be any bond-slavery, villenage, or captivity among us, unless it be [such] lawful captives taken in war, as willingly sell themselves, or are sold to us; and such shall have the *liberties and Christian usage,* which the law of God,established in Israel concerning such persons, doth morally require.(2) This law was not a dead letter. Chief Justies Parsons says,(3) ‘If the master was guilty of a cruel or unreasonable castigation of his slave, he was liable to be punished for a breach of the peace, and I believe the slave was allowed to demand sureties of the peace, against a violent and barbarous master. Under these regulations, the treatment of slaves was in general mild and humane, and they suffered hardships not greater than hired servants.’

(2) General Laws and Liberties of Massachusetts Bay, Chap. 12 § 2.

(3) Wiuchendon v. Hatfield 4 Mass. Rep. 127.

Throughout New England, it is believed that Slavery ‘was very far from being of the absolute, rigid kind. The master was as liable to be sued by the slave, in an action for beating or wounding, or for immoderate chastisement, as he would be, if he had thus treated an apprentice. A slave was capable of holding property, in character of devisee or legatee. If the master should take away such property, his slave would be entitled to an action against him, by his *prochein ami.* Slaves had the same right of life and property, as apprentices; and the difference between them was this: an apprentice is a servant for time, and the slave is a servant for life.’(4)

(4) Reeve Dom. Rel. 340—2 Dane Abr. 313.

The master had no control over the religion of the slave.—Ibid.

If the slavery of Massachusetts differed only in its duration from apprenticeship, it follows, that the subject of it could not have been removed without his consent, out of the Commonwealth,(5) as the respondent claims should be done with the subject of the

present suit. Negro slavery in this state was far milder than the ancient English villenage(6) —But even the villien could not he carried outer England.(7)

(5) Reeve, 340.

(6) 2 Dane Abr. 313.

(7) 20 Howell State Trials, 66.

The Declaration of Independence, though not having the force of law, must be considered as the expression of our fundamental policy. It was our initiatory act as a nation, dictated by ‘a decent respect to the opinions of mankind;’ a manifesto in which we set forth to the world the self-evident principles, which were to form the basis of our rising institutions.

Our own Declaration of Rights, and the judicial decisions founded on it, are indicatory of the same policy. The course taken by Massachusetts on the Missouri question, points in the same direction. To adapt the expressive language of the resolutions on slavery, adopted at a recent meeting of citizens in our Faneuil Hall, ‘Out laws do not authorize it—our principles revolt against it—our citizens will not tolerate its existence among them.’

Slavery falls within the third exception to the rule of national comity. It violates our public law. The law of this Commonwealth, on slavery, from the adoption of the Constitution of Massachusetts to the ratification of the Federal Constitution, was, to all intents and purposes, the same with the law of England. It had been settled in Somersets case,(8) in 1772, that the common law abhors, and will not endure the existence of slavery on English soil. This was an unbending principle. We have seen its application, when enlarged to the British Colonial possessions, in the case of the American slaves forced into Bermuda, and there discharged on *habeas corpus.* This was no unadvised set of the local authorities. It was sett?ed law. ‘In consequence of this decision [in Sommerset's case]’ says Mr. Christian, ‘if a ship leaden with slaves was *obliged* to put into an English harbor, all the slaves on board might

(8) 20 Howell, State Trials, 79.

21 and ought to be set at liberty.'(1) In Forbes vs. Cochrane(2) a similar doctrine was held.

(1) Bl. Com. 425 in Not. Ed. 1793.

(2) 2 B. & Cresw. 448.

Now I ask the court to look at the language of our Declaration of Rights, and say whether Sommersett's case *could* have settled a broader principle for England, than our State constitution establishes for us. When that instrument declares, that all men are born free, and that freedom is 'unalienable,' it covers the whole ground. It was followed by judicial decisions, applying its principles to the case of Massachusetts slavery.

'Slavery was introduced into this country,' says Parsons, C. J., 'soon after its first settlement, and was tolerated *until* the ratification of the present constitution,—but at the first action which came before the court after the establishment of the Constitution, the judges declared, that by virtue of the Declaration of Rights, slavery in this state was no more.'(3)

(3) 4 Mass. Rep. 127.

Again, all the component parts of slavery are forbidden by our law. If the parts are forbidden, is not that a prohibition of the whole? Slavery is a collection of abuses—of various invasions of personal rights. If our law will not permit a man to beat his neighbor, to kidnap or sell him into exile, to forbid his marriage, to rob him of his children, to deprive him of education, to plunder him of his earnings, shall we be told that it will allow a system which is an aggregate of all these offences? No parts of this system could be tolerated, but by positive law. Are we to introduce the whole through comity?

4.—A fourth exception to the admission of foreign laws by comity has been stated to be, where they would set before our citizens a pernicious and detestable example. It is indeed

asserted, on the other side, that slavery will not present a bad or dangerous example here, for the sentiment of our state is so strongly against it, that we have nothing to apprehend from its influence. It is a sufficient answer to this, that whatever is in itself bad and capable of imitation, must be, if tolerated among us, of bad example. It is no satisfactory reply to say, that the constitution forbids the holding of slaves in this state. The constitution is only the expression of public sentiment, and may be altered, if that sentiment could change. Jefferson has particularly noticed the pernicious influence of the example presented by slavery—

‘The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on one part and degrading submission on the other. Our children see this, and learn to imitate it. The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives loose to the worst of passions, and thus nursed, educated, and exercised in tyranny, cannot but be stamped by it with odious peculiarities.’(4)

(4) Notes on Virginia.

If, then, the influence of slavery is bad, it is not enough to say that that influence will be small here. I know not that it would be small in fact. At the time of Sommersett's case,when, I suppose, there were not one fourth as many slaves in the British West Indies, as there now are in the United States, and when the communication between those islands and Great Britain was ten-fold more difficult than it now is between the different parts of this country, Lord Mansfield said there were 15,000 slaves living in England, brought there by their masters, on the strength of an opinion, given a few years before by two eminent lawyers, that they might be still held in England, and carried back as slaves. (5) Here is a somewhat appalling statement. After all, however, this is not a question of degree, but of kind. If as a powerful example, it would be bad, as a weaker example it is bad still, Be it great or small, it is a part of our rights as freemen, to be neither pained nor corrupted by the presence of slavery.

(5) The London newspapers of that day were defiled by the notices of the sale of negroes; advertisements for runaway slaves, &c. See Clarkson's history of the abolition of the slave trade.

I trust it has been made to appear that independently of the Constitution of the United States, slavery is opposed to the morals and policy of Massachusetts, too diametrically to admit the exercise of the comity claimed. I now hope to show, that nothing contained in that instrument can affect the present question.

What, then, is the operation of the constitution of the U. S. on the subject of slavery in Massachusetts?

It has been argued, that, as the constitution of the United States recognizes slavery—in acceding to the constitution, we are estopped from denying its morality or policy. Estoppels are not favored in law,—and the doctrine set up savors of the most ultra school of liberal construction. How is it that the constitution recognizes slavery? In the first place, simply as a matter of fact; and, in the next place, by conferring certain rights, and prescribing certain duties, growing out of the existence of slavery. We have agreed to recognize slaves as a basis for direct taxation and representation,—and to give them up, when they abscond into the free 22 states,—and here we stop. How am I to deduce from this, the right claimed for the citizens of other states, to force their slaves upon us? The ground on which the recognition of slavery was admitted by Massachusetts into the constitution, was no change of sentiment on the subject of slavery. It was a compromise, for the sake of peace. It was only a recognition *pro tanto;* and so far as we have agreed to recognize it, we do so,—that is, within certain limits, and in a particular way. The position that, having recognized it to a limited extent, we are bound not to object to its being carried to a greater extent, is net a new one. It was a leading argument at the time of the Missouri question, that, having admitted the principle of slavery in the constitution, we could not object to its extension into new states. But this ground was rejected by the north, and no where more decisively than in Massachusetts. More recently, it has been asserted, that the recognition of slavery

in the national compact renders it unlawful for individuals, in the free states, to discuss its evils or their remedy. These loose suggestions argue a very superficial acquaintance with the constitution. I will not urge again, the general considerations by which I have shewn that the terms of the constitution are the measure of the surrender made by the parties to it, of their peculiar principles or rights. It is sufficient to say, that an amendment to the constitution inserted with jealous care, provides that 'The powers not delegated to the U. States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

To apply this rule to the case before us. Independently of the case of fugitive slaves, no power is delegated to the United States, by the constitution, to regulate the relation of master and slave within the several states,—nor is the power to regulate or annul that relation prohibited by the constitution to the states respectively. Each state is sovereign in regard to it, and Massachusetts only owes to Louisiana (it being a case not provided for in the constitution,) the same consideration that would be due to Spain, or any other friendly power.

The second section of the fourth article of the constitution of the United States, which enacts that 'no person held to labor or service, in one state, under the laws thereof, *escaping* into another, shall, in consequence of any law therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due,' has received a judicial construction in two cases decided in Pennsylvania. In Butler vs. Hopper(1) Judge Washington decided, that this clause did not extend to the case of a slave *voluntarily* carried by his master into another state, and there leaving him, under the protection of some law declaring him free. The same point—namely, that the constitutional provision, respecting persons *escaping* from labor, is to be strictly construed, was again decided by the same Judge, *Ex parte Simmons.* (2)

(1) 1 Wash. C. C. Rep. 501.

(2) 4 Wash. C. C. R. 396.

A third case may be adduced, decided Feb. 20, 1836, by Judge Barnes, more recently President of the District Court for the city and county of Philadelphia, upon the following facts.(3) Marshall Green, a black man, was claimed as a slave, by Peter Buchell of Maryland. About four years previous to the hearing before Judge Barnes, Marshall absconded from his master's residence, and continued absent till August, 1835, when he was arrested by Buchell, his master, and carried back to Maryland. At the time when he absconded, he took with him his three children, who were alleged also to be slaves. After Marshall's return to Maryland, Buchell, in order to obtain possession of these children, gave him permission, and for that purpose furnished him with a pass, to come into Pennsylvania, upon his express promise, that he would, within a certain period, if successful in the pursuit of his children, bring them to his master,—if not successful, he would return himself. The time of absence granted by the master, having expired, Marshall was again arrested. Judge Barnes refused the certificate applied for by the master, on the ground that the act of Congress, founded on the constitutional provision, did not embrace a case like that before him—inasmuch as Marshall was not a *fugitive* slave, had not *escaped* from one state into another,—but by his master's consent had left Maryland, and come into Pennsylvania.

(3) Stroud's Slave Laws 167.

If, then, this provision of the constitution cannot be made to cover the present claim, it has necessarily a strong bearing against it. It is a sound maxim of construction, that *Expressum facit cessare tacitum.* In Lunsford v. Coquillon,(4) the Supreme Court of Louisiana say,—

(4) Mart. Rep. 465.

‘The right of a state to pass laws, dissolving the relation of master and servant, is recognized in the constitution of the U. S. by a very forcible implication. This instrument, declares, that no person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation thereof, be discharged from such service or labor. Hence the implication is strong, that such persons who do not *escape,* but whose owners voluntarily bring, may be discharged by the laws or regulations of the state, in which 23 they are so brought. For if this could not be, to what use would be the prohibition?’

A similar remark may be made, respecting the statutory provisions of the states, cited by the opposing counsel. I take as an example, the statute of New York. It pronounces all persons in that state to be free, with certain exceptions, among which is that of slaves attending their masters, on a visit of less than six months. It is obvious that the framers of that law supposed the special exemption was *necessary,* to prevent the local law of freedom from entirely annulling the law of the foreign domicil.

No man is more settled than I am in the conviction, that the court must administer justice according to law. Be the constitution what it may, *here* we are to abide by it. It is indeed my opinion, that the northern states, in their concessions to slavery contained in that instrument, particularly in pledging themselves to *active* measures, for restoring runaway slaves, were guilty of a compromise of long avowed principles,(1) a barter of conscience, a violation of the *express law of God,* which commands, ‘Thou shalt not deliver unto his master, the servant which is escaped from his master unto thee. He shall dwell with thee; where it liketh him best. Thou shalt not oppress him.’(2) Still, were this like the care of a fugitive slave, where, as I conceive, the laws of God and the laws of man conflict, I should *not* stand here before a legal tribunal, and urge the court to disregard or annul the human law. I only claim, that when, as in the present case, we get beyond the sphere of the human enactment, the court are free there to look to the will of God (‘the perfect law of liberty’) alone. In this sense, and to this extent, ‘christianity is part of the common

law,'—But my learned brother is not satisfied with having the human law paramount, within its own limits. He claims that whatever be the view which good morals or religion take of slavery, the laws of man having introduced it to a certain extent, there would be great *inconsistency* in stopping there; or in even professing any more conscientious scruples on the subject. He argues that, as one of this court might be called on to give a certificate for the removal of a fugitive slave to-morrow, there would be gross inconsistency in deciding that the voluntary introduction of slavery into Massachusetts would be immoral and impolitic to-day.

(1) 'Many sacrifices of opinion and feeling.'—Story, 3 Comm. on Const. 677

(2) 23 Deut. 15, 16.

I can scarcely believe, that the learned counsel can seriously argue that the State of Massachusetts, having become a party to a compact, under which certain rights are secured to slave masters, is to be presumed to have abandoned her long cherished views of the character and tendency of slavery; or her policy of excluding it from her soil. Nothing in her history or public acts gives the least countenance to such a theory. We all know, perfectly well, that Massachusetts did not agree to restore fugitive slaves, because she had changed her mind as to slavery, but because she feared anarchy and divisions,—and the constitution, such as it was, was the best bargain she could make. We do not restore these unhappy beings now, because it is right so to do, but because, right or wrong, we have agreed to it. Suppose, then, we admit, for a moment, the gentleman's charge of inconsistency, and what follows?—why, nothing, but to be thankful that the merit of inconsistency is still left for us. To be thoroughly consistent in wrong, would be truly a 'bad eminence,'

But, I have no belief that the court will admit, that a decision in favor of the petitioner would involve any inconsistency whatever. I will borrow the language of the learned counsel for the respondent, in speaking of the 'morality' of slavery, and say of 'consistency,' that it is to

be measured, in a court of law, by a legal standard alone. And I shall new attempt to show, that the European law of slavery proceeds entirely on the ground, which has been charged as inconsistent;—and moreover, that courts of the highest authority in the free States of our country, and Jurists of the highest eminence, have not felt themselves hound, by the obligations contained in the constitution, from deciding against the comity, which seeks to introduce slavery into those states.

In the case of Sommersett, the leading English case, it was decided that ‘slavery is of such a nature that it is incapable of being introduced on any reasons moral or political,—but only by positive law. It is so odious that nothing can be suffered to support it but positive law.’(3) It is thus conceded by Lord Mansfield, that the same institution which was then sustained, and even encouraged, by the British Government in the colonies, whore it was supported by the customary law, might be declared by the courts to be too odious and immoral to be allowed a footing on English ground. A necessary position of Mr. Hargrave, in his masterly argument for the slave Sommersett, is that slavery is, in the contemplation of law, a purely local institution; and that, as such, its being tolerated by law, in one part of the British dominions, did not prevent the court from deciding on its immorality and impolicy at home.—And this view was certainly confirmed by the court. I have already said, that this has been long a rule of law of the principal states in Europe. It may be stated as I have done, 3

(3) 20 Howell State Trials, 82.

24 that slavery is a nearly local institution—or, more plainly; that the law of all Europe is, that slaves in the colonies are *property* —in the parent country they are *men,* —and all the legislation and judicial decisions of those countries, on the subject of slaves, proceed on that ground. On this account, Lord Mansfield says,(1) there is no difficulty in giving effect in England, to a contract lot the sale of a slave in the W. I.—but, where the person of the slave is in England, and becomes the subject in controversy, that is a widely different case. If this distinction be clearly kept in view, coupled with the principle, that no civilized nation will sanction an aggression upon the legal rights of the citizens of other friendly

States, within their own limits, we shall find no great difficulty in reconciling the admiralty and other cases, cited by the respondent's counsel, with the point for which we contend.

(1) 20 Howell St. Tr. 79.

The case of Forbes vs. Cochrane, before cited, is very full to this point. Holroyd, J. remarks, ‘according to the principles of the English law, such a right cannot be considered as warranted, by the general law of nature. I do not mean to say, that particular circumstances may not introduce a legal relation to that extent; but assuming that there may be such a relation, *it can only have a local existence,* where it is tolerated by the particular law of the place. The law el slavery is a law *in invitum;* and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is *founded on the municipal law of the particular place only,* does not continue.’

Best, J. said, ‘ *slavery is a local law,* and therefore if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits, where slavery is recognized by the local law, they have broken their chains, they have escaped from their prison, and are free. The plaintiff does not found his action upon any violation of the *English* laws, but he relies upon the comity of nations. I am of opinion, however, that he cannot maintain any action in this country, by the comity of nations. *Although the English law has recognized slavery, it has done so within certain limits only.* —Whatever service he (the slave) owed by the local law, is got rid of, the moment he got out of the local limits.’

In the case of Knight v. Wedderburn,(2) tried in Scotland, before the Court of Session, Jan. 15, 1778, it was argued for Mr. Wedderburn, in support of his claim to the services of Knight, a Jamaica slave, whom he had brought with him to Scotland, that Knight was still a slave. ‘A right of property,’ said the counsel, ‘will be sustained in every country, where

the subject of it may come. The *Status* of persons attend them wherever they go The law of the colonies is not to be considered unjust, in authorizing this condition of slavery. *The statutes which encourage the African trade, show that the Legislature de not look on it in that light.* ’

(2) 20 How. St. Tr. 3, note.

‘The *Court* were of opinion, that the dominion assumed over this negro, *under the law* of Jamaica, *being unjust,* could not be supported *in this country,* to any extent.’

We have seen in the case of Forbes v. Cochrane, that the British courts will not respect the claims el Spanish slave-masters, when their slaves get out of Spanish territory. And yet Great Britain has recognized, in a great number of treaties and other public acts, the right of Spain to hold slaves. In the treaty of Utrecht, in 1713, there is an express stipulation that 4800 slaves should be annually supplied to the Spaniards. But not to rely on this, very recent conventions recognize the right of Spain to prosecute the slave trade, south of the line. Yet Great Britain finds no inconsistency between these acts, and her laws denominating the slave trade a crying enormity. I do not mean to deny, that the policy of foreign governments and of our own, does in my own private judgment, involve inconsistency.

‘Earth is sick, And Heaven is weary of the hollow words Which kings and statesmen utter, when they talk Of justice.’

The prohibition of the foreign slave trade by our own government, at the same time that we tolerate the domestic slave trade, is grossly inconsistent. Still in legal contemplation, it is otherwise,—and this is sufficient for our present purpose. The States of Europe have seen the evils of slavery too clearly, to allow it a foothold at home, while mistaken views of colonial policy have caused them to vie with each other, in encouraging it abroad.

I now refer to a few American cases, to show that we haw adopted in this country a policy analogous to that of England,—by recognizing slavery as a local or partially acknowledged institution only. Our law is that slaves are *property* within certain limits, namely, (representation excepted) while they remain under the local law of slavery, or when they appear elsewhere in the character of fugitives. They are, on the other hand, *men* where representation in Congress is concerned, or whenever they come rightfully within the limits of the local law of freedom.

I refer the court again to the case *Ex parte Simmons,* decided by Judge Washington, himself a slaveholder. 25 In that case, the claimant of the slave, who had been a resident of South Carolina, and still had a house and plantation there, came to Philadelphia with his slave, hired a house and occupied it for about ten months. The law of Pennsylvania authorizes sojourners, who shall not remain within that State more than six months, to retain control over the slaves whom they bring with them. It was determined by the Judge that, as the claimant did not bring himself within the exception of the statute, the slave was free. I submit to the Court, that in this commonwealth, a slave master can have no greater rights on his first arrival here with his slave, than he has in Pennsylvania after remaining there six months. The call on us for comity in the case now before the court, is not more imperative than it was in Pennsylvania in the cases cited. In both cases alike, the claim is that the provisions of the positive law of the country should be enlarged, out of comity to a foreigner. The Pennsylvania case goes clearly on the ground that the provisions of the constitution of the U. S. create no obligations on the States, except by their express terms, and according to their plain and direct import.

In Commonwealth vs. Holloway(1) it was held that the law of e slave state that ‘a child follows the condition of its mother,’ *partus sequitur ventrem,* could not be adopted by comity, in Pennsylvania, in the case of the child of a slave who had absconded from another state, before she became pregnant. I refer also to Butler v. Hopper, before cited.

(1) 4 Serg. & R. 305.

In the case of Saul vs. His Creditors,(2) the Supreme Court of Louisiana uses the following language:

(2) 17 Mart. Rep. 598.

‘Take another case. By the laws of this country, Slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it, is carried to England or Massachusetts; would their courts sustain the argument, that his state or condition was fixed by the laws of his domicil of origin? *We know they would not.* ’

The case of Francisco(3) came before the present Chief Justice of this Court, on *habeas corpus.* In that case, Mrs. Howard, a resident in the Island of Cuba, and the supposed owner of the boy Francisco, by her return to the writ, expressly disclaimed holding him as a slave. The boy, on being examined by the Judge privately, expressed his desire to go with Mrs. Howard. The Chief Justice decided that the boy might do as he chose,—saying in his opinion, ‘If Mrs. Howard, in her return to the writ, had claimed the boy as a slave, I should have ordered him to be discharged from her custody. The boy, *by the law of Massachusetts,* is in fact, free.’

(3) 9 Amer. Jurist 490.

The author of ‘The Conflict of Laws’ touches on this very point. Referring to Sommersett's case, he says, ‘As soon as a slave lands in England, he becomes, *ipso facto,* a freeman, and discharged item the state of servitude. Independent of the provisions of the Constitution of the United States, for the protection of the rights of masters in respect to domestic fugitive slaves, there is no doubt that the same principle pervades the common law of the non-slaveholding States in America.’(4)

(4) Confl. Laws 92. Observe that the present tense, *pervades,* is used. I understand the author to assert that, with the single exception of the case of fugitives, the English rule is now actually operating here.

A case decided in Indiana, by Judge Morris, end reported in the Jurist, has been cited by the counsel for the respondent, as having a bearing adverse to the petitioner's claim. The decisions in the Indiana Courts are rarely referred to here. And I may add, without intentional disrespect, that I have been unable to ascertain who Judge Morris is. The case there was decided, as appears, in favor of the freedom of the slaves. The remarks of the Judge, relied on by my learned brother, were not called for by the circumstances of the case, and may be considered extrajudicial. The opinion appears to involve evident mistakes of law. For example, the Judge declares, that where a citizen of a slave State is travelling upon business or pleasure attended by his slave, ‘an escape from the attendance upon the person of his master, while on a journey through a free State, *should be considered as an escape from the State,* where the master had a right of citizenship, and by the laws of which the service of the slave was due.’ I need not say how entirely this mode of enlarging by construction the scope of the constitutional provisions respecting fugitives, militates with settled law. Indeed it does not seem very consistent with other portions of the Judge's own reasoning.

This loose way of construing the Constitution has not met much favor in the Northern States. The constitution provides, that ‘a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the *State from which he fled,* be delivered up, to be removed to the State having jurisdiction of the crime.’ A grand jury in Alabama, about a year since, indicted R. G. Williams, a citizen of New-York, for having published, in a newspaper called ‘the Emancipator,’ the following ‘insurrectionary’ words: ‘God commands, and all fissure cries out, that man should not be held as property. The system of making men property, has plunged 2,250,000 of our fellow countrymen into the deepest physical and moral

degradation, and they 26 are every moment sinking deeper.' The Executive of Alabama demanded the delivery of Williams, to answer to this charge in Alabama;—but it being notorious that he had never been in that State, and could not therefore have 'fled' from it, the Governor of New York, after consulting with his law advisers, very properly refused the application. The Governor's letter maintains very ably, that the provision of the constitution is to be construed strictly.

The claim set up by the slave master in the Indiana case, is readily distinguished from the present. The master only claimed there the right to pass with his slaves, from one slave State to another, through a free State;—a mere transit, not, as here, a needless residence. It is possible that comity may depend in same degree on locality. The geographical position of Indiana, lying between Kentucky and Missouri, may be thought to present some apparent necessity for relaxing in certain cases, the domestic rule against slavery. No such necessity exists here, and considerations of convenience, as well as of law, urge us to adhere to our ancient policy.

The comity asked in the present case is not toward a mere *transitus,* but is to be extended to a temporary residence. Now these are widely different questions. A transit is a thing well understood and easily determined. What is temporary residence, is a far more difficult enquiry. The doctrine of 'domicil;' questions of the *qua animo,* or intention, these conduct to dubious and intricate ground. How long may the temporary residence continue? Recollect we have no legislative limitation, as in New York and Pennsylvania. Why may not citizens of the slave States remain here with their slaves ten years as well as ten months, if the *animus revertendi* be preserved? What security have we that the fields of Massachusetts may not be tilled by slaves?

It is stated in Sommersett's case, that there were then fifteen thousand slaves in England. Lord Mansfield estimates the apprehended loss to their masters, at 700,000 *l.* sterling, and expresses great solicitude as to the consequences of 'setting them loose.' There are not probably twenty persons held as slaves in Massachusetts, to be affected by your decision.

If slavery is introduced at all, in the case of sojourners, why should we not introduce it, as it exists in the Southern States? The learned counsel has indeed most prudently restricted the master's claim. But why should he do so? Has he not said that the personal capacity or incapacity of foreigners as between themselves attends them here,—and sticks like the shadow—‘ *sicut umbra sequitur* ’? Besides, in avowing that he claims to carry this child back into slavery, he admits the intention of doing her a far greater injury than mere beating. If she is to be robbed of her liberty, all other losses are in comparison, but trifling. And such is the view taken by our law. Kidnapping, or imprisoning with intent to kidnap, is one of the highest crimes. The greatest cruelty of all is contemplated here, namely, the removal of the child to a place where slavery, with its usual features, will again attach upon her.

The force of Lord Mansfield's remark cited by the respondent's counsel, is certainly unimpaired by the criticism we have listened to. ‘The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme.’(1) The learned counsel has limited the slave-master's claim to the utmost,—yet let us see what it still includes. It must include the right absolutely to direct the slave's locomotion,—here is one incident of slavery; to confine his person,—there is another; to exact his labor without wages, (for the case must find that he comes as ‘a personal attendant,’)—this is a third; to compel submission here, by any degree of personal violence that may be found necessary, and to force him out of Massachusetts, if persuasion should fail, by the cogent aid of the whip or the fetter. Are not these the hateful features of slavery? If the slave should marry while here, he must, of course, be separated from his wife. Here is the old, familiar process of the slave-trader. No,—all the learned counsel's ingenuity could not shew an English or a Massachusetts Court, how to adopt the relation without adopting its most abhorrent consequences. And the reason el this is obvious.—Slavery is an abuse. It is not a thing to be reformed or regulated. Take away its incidents of oppression and baseness, and it is all gone. So tar as it exists at all, it exists for evil. We have been told that no practical evil is found to occur in New York or Pennsylvania, from allowing a temporary existence to

slavery in the case of sojourners. Having no evidence before us on this point, we can only form an *a priori* judgment. I do not doubt that great, that irreparable evil occurs wherever slavery is tolerated, be it for a century or for a day,—and I conceive this to be the doctrine of Massachusetts. We hear no complaints, it is said, from those States. True; neither do we hear any complaints against slavery, from Georgia or Louisiana. Evil may be their good. Supposed pecuniary advantages may with them outweigh moral ones. I judge them not. It is enough to say that, as a sovereign State, Massachusetts does not borrow her views of slavery from States that may deem it right, or pleasant, or profitable to allow it.

(1) 20 How. St. Tr. 79.

The condition of a Louisiana slave, held as such in Massachusetts, is anomalous. We have no common law to regulate it. My learned brother has laid down the principle, that it will be the province of the judicial 27 tribunals, and not of the Legislature, to do this. What then are to be the rights and duties of this very peculiar member of our society? Can he make a contract? Will you give effect to his marriage? Or shall it be void, and his children illegitimate? Are the children of the slave mother born here to be also slaves? Or will their father, if he should be a free citizen of Massachusetts, be entitled to his own children? If the slave see a crime committed by his master, shall he be admitted as a witness? Alas for the slave, if he testify against his master! The exclusion of slave testimony is an indispensable part at the institution of slavery. If a slave in Massachusetts is slandered, has be a remedy? Is his character his own? If he is assaulted by a stranger, has he his action as a *person,* or is it with the master, as for an injury to *property?* Shall there be any protection for the slave against his master? May the master be bound to keep the peace towards him? Probably not; for in the case of an adult, the utmost violence might be necessary to compel submission. There can be no divorce between such parties, for cruelty;—no cancelation of indentures, for abuse of authority. A slave has no civil rights. Even to maim or murder him, is only an offense against Government: and is punished on the same principle that we forbid cruelty to brutes,—not for their sakes, but for our own. If the sieve refuse to leave the State, how shall he be compelled Will you justify an

assault and battery upon him?—Suppose he kill his master in self-defence; is his crime murder? How far will this Court go, in giving validity to contracts for the hiring or sale of slaves here? If one stranger sells to another the slave he has brought with him, and does act deliver him, will you sustain *trover* for a human being? Or, sitting as u Court of Equity, will you enforce specific performance of a contract for the sale of a fellow creature, thus making the Supreme Court an instrument in the domestic slave-trade?

These consequences seem indeed revolting, but they are in character with the system to which they belong.

I have thus endeavored to show that the extension of slavery here is unlawful and inexpedient. It is cause for the sincerest gratification, to reflect that this question, important to our whole country, is to be left in the hands of the judiciary of Massachusetts. The eloquent encomium of Sir William Best, on the Courts of his own country, will not be thought inapplicable here, by the friends of freedom, looking, as they will, with anxious hope, to the decision of this tribunal.

‘It is matter of pride,’ says that eminent judge, ‘for me to recollect, that whilst economists and politicians were recommending to the Legislature the protection of this traffic, and senators were framing laws for its promotion, and declaring it a benefit to the country,—the judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that Slavery was inconsistent with the genius of the English Constitution, and that human beings could not be the subject matter of property. As a lawyer, I speak of that early determination, when a different doctrine was prevailing in the Senate, with a considerable degree of professional pride.’(1)

(1) Forbes v. Cochrane. 2 Barn. & Cr. 470.

The generous boast of the English poet haunts the memory of every lover of liberty:

‘Slaves cannot breathe in England:—if their lungs Receive our air, that moment they are free. They touch, our country, and their shackles fall— That's noble, and bespeaks a nation proud And jealous of the blessing.—’

This exalted pride cannot be fully ours. We have sold it for a price. The fugitive from slavery is hunted like a felon, through this favored State. Let us stop there. Let not the accursed system thrive among us. If we are to be restrained from attacking the giant trunk, —if we have even consented to let a single bough shoot over among us, to taint our air, —I trust by the blessing of Heaven, we have yet strength and virtue enough to top its luxuriance.—God forbid that the deadly branches should bend over and strike root, to become in their turn, a parent-stock, growing up in the soil of Massachusetts.

HON. RUFUS CHOATE, FOR THE PETITIONER.

Hon. Rufus Choate followed, for the Petitioner and, after remarking that his colleague had exhausted the subject, and that he intended to argue on more narrow grounds—said that the proposition contended for by the counsel for the Respondent was this: that an inhabitant of a slaveholding State may bring his slave into Massachusetts, may restrain him here as a slave for an indefinite period—for any period that should not absolutely domiciliate the master,—and may carry him by force back again into slavery, when he returns.

He said, the extent to which this principle might practically be carried, could not fail to suggest doubts of its soundness. If one planter may bring one slave into Massachusetts and so restrain him, every one may bring any number of his slaves. If he may hold him, through a summer's residence, as a slave, be may cause him to labor as a slave, and by all the means, under all the penalties, by which slave labor is exacted in Louisiana. All the incidents of slavery must accompany the relation. The law of Massachusetts did not recognize slavery, and therefore could not regulate it. It must exist here just as it exists in Louisiana. It must exist here ruder the law of Louisiana, admitted by comity, and according

to that law. Such was Lord Mansfield's opinion, as expressed in Sommersett's case. The consequence might be, that slavery, in its most offensive forms, might be practically administered in Massachusetts. It will be proper to discuss the question in a historical and chronological order.

What was the law of Massachusetts upon the subject, before the adoption of the Federal Constitution—and how far did the adoption of that instrument change it?

And he would state the first question, thus:—is there any evidence or any ground for the Court to presume, that, when the State of Massachusetts, between the years 1770 and 1783, abolished the institution of domestic servitude, she retained or adopted the principle, that a foreign slaveholder might bring his slates within her territory,—restrain and treat them as slaves, as long as he pleased to stay, not gaining a domicil,—and carry them away again by force into slavery;—and that, to a habeas corpus sued by the slave in her domestic courts, the master might plead the foreign law of slavery?

There is no such evidence, and no ground for such presumption. He contended, on the contrary, that it was entirely clear, that, when domestic slavery was abolished in this State, it became at ones t part of its jurisprudence that no foreign law of slavery thenceforward could have any effect or operation, or be in any manner recognized against a slave asserting his liberty in her courts,—that, to a foreign law of slavery, comity was not to be extended,—that, in this conflict of foreign and domestic laws, the former must yield.

He argued in support of this proposition, on several grounds. In the first place, at the time when this State abolished slavery, it was a well settled, well known principle of the law of England, that, when a nation ceases to tolerate the existence of domestic slavery, a foreign law of slavery cannot be set up in its courts against a slave asserting his liberty on the domestic law,—in other words, that the comity of nations does not require or justify any tolerance of a foreign law of slavery. This was settled in Sommersett's case. That case decided two points:— *first,* that the institution of domestic slavery did not exist in England

— *second,* the general principle, that comity cannot be applied to a foreign law of slavery coming in conflict with the domestic law of liberty.

It is argued on the part of the respondent that no principle concerning the comity of nations was settled in Sommersett's case—because it is said that the phrase, comity of nations, imports respect paid to the law of a foreign and independent nation,—that the British West Indies are not independent of England. But this is not so. The comity of nations, as the phrase is universally understood in the books of law, means a respect paid to a foreign law a *lex loci* —whether of an independent State or a State not independent. It does not suppose a conflict of independent nations, but a conflict of *codes.* It is a respect paid not to a nation because she is independent and may go to war, but it is paid according to a general principle of justice to every community, so considerable and so distinct, as to have a local judicature and local courts. Thus the respect paid in England to the local law of Scotland, is paid by the comity of nations. Mr. Hargrave's argument and the language of the court plainly show that the question whether the *lex loci* of the West Indies should be allowed to be pleaded against the domestic law, was discussed as a general question concerning the comity of nations, and that it was 29 decided against the *lex loci* —not because the West Indies were not independent of England, but because no foreign law of slavery, of whatever nation, can be set up against the domestic law of freedom.

This having been the settled law of England, at the time we abolished slavery, it became instantly part of our law. The second point adjudged in Sommersett's case was authority here. It was decided before the Revolution. It settled and ascertained a great general principle of the common law applicable to the Conflict of Laws, and so soon as that principle became applicable to our circumstances—that is, so soon as we abolished slavery—it had instantly the force of authority. Whether it had the fores of authority or not, there was the most satisfactory evidence, that it was adopted here. As a general rule, whenever a principle is shewn to have been part of the common law of England at any given period before the revolution, it is to be presumed to have been part of the law of the Colony or Province of Massachusetts, at the same period, if applicable to its

circumstances. If the inquiry is, what was the law of Massachusetts in 1774, we refer to the decisions of Westminster Hall of that time, to ascertain it. When slavery was abolished here, therefore, is is to be presumed that we adopted the principle which forms the second point decided in Sommersett's case.

This presumption is strengthened by historical evidence. The historians of Massachusetts, and Dr. Belknap, in his letter to Judge Tucker,(1) prove that slavery had been nearly or altogether abolished before the revolution. The case of Sommersett was re-printed and circulated here—it was cited in the courts. Negroes were encouraged by it to sue for their liberty—and the Courts of Justice, long before the State Constitution (as early as 1770) universally sustained their claim. Was it to be believed, that, when we thus by acclamation adopted one part of the doctrine in Sommersett's case, we rejected the other? That, when we followed the splendid example of England, and declared that our own citizens should not pollute our soil with slaves, we did not also follow the entire example, by declaring that foreigners should not do what was forbidden to our citizens?

(1) In the Massachusetts Historical Collections. See also, Bradford's History of Massachusetts.

The principle was applicable to our circumstances at that time—it accorded perfectly with our known feelings and dispositions on the subject of slavery—the public mind was fully prepared for it—and it cannot be doubted that it was adopted. It might be added, that there was not the slightest evidence of any local law of Massachusetts on this subject different from the law of England—there were no decisions and no practice and no recollections of court or counsel to shaw it. There was nothing in our relations at that time to the other Colonies to induce a presumption that we should refuse to adopt this principle of English law, from any disposition to favor their system of slavery. It is notorious, that we were hostile to those systems, and that ill blood was excited between the Northern and Southern Colonies, on the subject of slavery, before and during the revolution. This feeling manifested itself strongly during the discussion on the articles of confederation. It is well

known, that some of the free States even refused to permit slaveholders to follow fugitive slaves into their territories. Can there be stronger evidence that they did not adopt any such principle of comity as is here contended for—and did adopt the whole doctrine of Sommersett's case? The state of feeling,—in the Convention which formed the Federal Constitution, and in the Conventions of the free States which adopted it,—touching the question of slavery, is matter of history.

Stronger reasons existed, why England should have respected the *lex loci* of her own West India islands concerning slaves, than that we should have respected the *lex loci* of the other Colonies. England had made the *lex loci* of the West Indies; she had reared up slavery there; she had, in various ways, through her legislation and by her public officers, invited her West India subjects to bring their slaves to England, on the assurance that their property in them should be respected. Many thousands of them were there, at the time Sommersett's case was decided, whom that decision instantly enabled to set themselves free. It must have been a clear and energetic principle of the English law, which asserted itself against all these interests and considerations. It could not be pretended that we were under any such obligation—as that of England to her West Indies—towards the Southern Colonies of this Country. We had nothing to do in forcing slavery upon them, and without injustice or discourtesy, might exclude it from our territory.

An additional ground of presumption that the doctrine of Sommersett's case was adopted here, is, that it was even then the doctrine of every code of Europe. It is part of the universal jurisprudence of all civilization, and not merely of the common law of England. Authorities cited in Mr. Hargrave's argument, and Mr. Justice Story's authoritative and masterly work on the Conflict of Laws fully sustain this position. No State in Europe, 30 haying abolished slavery at home, though permitting it in its colonies, allows the colonial law of slavery to be pleaded against the slave asserting his liberty in the domestic court; and none did so at the time slavery was abolished here. How was it to be pretended, that we disregarded the universal example?

An examination of the general principles, by which the extension of comity to a foreign law is admitted to be regulated, will shew that it is impossible that Massachusetts should have introduced into her soda the principle of comity here contended for. Those general principles are clearly stated by Mr. Justice Story in his ‘Conflict of Laws.’ It appears to be clear that comity is not to be applied to a foreign law which is contrary to morality. Now in the judgment of the law of Massachusetts as it stood in 1789, slavery was contrary to morality. The Constitution of Massachusetts (its paramount law) asserted the great principle that all men are born free, and that the right to liberty was inalienable. It follows that to deprive one of that liberty is unjust, and contrary, of course, to morality. By the law of Massachusetts, then, as declared in 1780, slaveholding is immoral. What sort of comity is that, which compliments a foreigner with the license to commit what the law declares to be a crime, if committed by an inhabitant? Comity is only policy and courtesy—and is never to be indulged, at the expense of what the State, as a State, by its public law, declares to be justice.

Dr. Belknap states, in his letter before referred to, that the clause before cited from the Declaration of Rights, (the inalienableness of liberty) was inserted expressly to put the abolition of slavery on a general principle, that is, upon the principle that slavery is unjust—immoral—against natural rights. That this sentiment of the law of Massachusetts is further manifested by the statute of 1789, c. 48. It may be added that every historian of that time asserts, and every well-informed man in the community now believes, that by the public sentiment of Massachusetts of that time, slavery was held unjust and criminal.

Comity to a foreign law, upon the general principles which regulate it, never is extended so far as to permit a foreigner to do with impunity that which the domestic criminal law punishes in a citizen. But if a foreign master may, on the foreign law, restrain his slave here for the purpose of carrying him back to slavery, and the slave should make an effort to escape, and, in the struggle, his master should kill him, the act would necessarily be innocent, excisable, or justifiable. The same act, committed by a citizen of Massachusetts,

would be murder. This license to a foreigner, to be exempted from a domestic criminal law governing the citizen, may be given by special and arbitrary dispensation, but can never be the result of general principles.

It was also to be observed, that no decision of any court of any free State had been produced to shew that a different doctrine had been holden elsewhere. The opinion of Judge Morris, so far as it bears on this question, was an *obiter dictum,* and is no evidence of the law of Indiana. The point in judgment he decided rightly. The special legislation of some free States, for the protection of the master's property in slaves during a temporary residence, has no tendency to shew that the common law of those States would allow that protection—but implies that it would not. It can have no tendency to illustrate our common law. Decisions are referred to, that slaves, who have been carried by their masters into a free State, temporarily restrained there, and brought back to a slave State, (having, while in the free State, made no assertion of their liberty by writ,) may be holden as slaves, that is, that a temporary residence in a free State, unaccompanied by a suit for liberty there, could not be set up, on their return to the slave State, against the title of the master. But this had not the slightest tendency to shew, that if the slave had sued for his liberty, while in the free State, his claim must not have been allowed. The same doctrine is holden in the Admiralty Court of England, where, however, the doctrine of Sommersett's case is admitted to be settled law.

On these grounds it is submitted, that the court will presume and declare, that up to the adoption of the Federal Constitution, it was a principle of the common law of Massachusetts alter she had abolished slavery, that national comity was inapplicable to a foreign law of slavery set up in her courts against a person asserting his liberty under the domestic law.

2.—The next question is, to what extent did the adoption of the Federal Constitution change the common law of Massachusetts?

It made just such a change, as the terms of that instrument, justly construed, created —and no more. All grants of power to the general government or to the other States, all prohibitions upon the power of this State, are to be justly construed and enforced; and beyond that, the court will say, the common law of Massachusetts underwent no change. If, before the adoption of that instrument, the common law of Massachusetts did not extend comity to any foreign law of slavery, it does not now, unless the terms of the constitution, properly construed, require it to do so. All schools of construction must admit this principle.

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Then, there is no clause in the constitution, giving to this master the right to assert the law of Louisiana against the law of Massachusetts, and prohibiting Massachusetts from asserting her common law, under the circumstances of the case now before the court. The provision concerning fugitive slaves is admitted to be inapplicable. The decision of Mr. Justice Washington and of the court of Louisiana itself are directly in point. The case, then, of a master voluntarily bringing his slave here, stands on the old, unaltered law of Massachusetts.

To assert that the new relations and closer union created by the Federal Constitution required a comity to the local law of slave States, which did not exist before, avails nothing. The court will require evidence, that this State determined, upon the adoption of the constitution, to extend such comity. But there is no evidence of an intention to do any thing,to give any thing, but the constitution itself. There is no legislation showing such intention. It was well known, too, that what the constitution actually conceded on this subject, the free States conceded reluctantly, and on the principles of compromise. To imply concessions beyond such a grant, accompanying it but not named in it, would be wholly inadmissible.

It was said, since the adoption of the constitution, we are not at liberty to say, that slaveholding is immoral. But it has been shown, that, by the law of Massachusetts before

the constitution, slaveholding was declared immoral, and abolished; and the principle of the inapplicableness of comity to foreign laws of slavery settled. We do not, by the constitution, falsify our legal history. We do not, by the constitution, declare that it is moral or lawful to do any thing more within our territory, than to arrest a fugitive slave, and take him at once away. Beyond that, the legal morality of Massachusetts is unchanged. All other acts and incidents of slaveholding are by our law as immoral as ever. Legal Morality, so to speak, like all the parts of law, is arbitrary, conventional, and of positive institution, to a great extent. The government of a country may declare the same act immoral in one part of its territory, and moral in another. 4

CHARLES P. CURTIS, ESQ., FOR THE RESPONDENT.

Mr. C. P. Curtis remarked,in reply to Mr. Choate, that we should keep clearly in view the point presented on this return. The point is that a citizen of a State of this Union, in which slavery is tolerated, who comes here for business or pleasure, bringing a slave with him, may retain the slave and take him away when he returns to his own State, and this will be no violation of the laws of Massachusetts.

It is conceded that this child is a slave by the law of Louisiana. Moveable property accompanies the proprietor in his change of domicil, and its rights follow his person like his shadow. What is the law of property in his own country, is as to him, the *law* in the country which he visits.

It has not been denied that it is the province of the courts to decide how far a foreign law shall by comity be introduced here. If the court may decide on the admission of the foreign law, it may modify that law. The court would allow the slaveholder to take away his slave, but not to beat him, or exercise over him any authority,(except that of necessary restraint,) which though lawful at home, would be unlawful here.

The principles of international law are broad enough to admit comity to apply in this case. The case of Madrazo, in Barnwell and Alderson, recognises a right of property in slaves. It

is true that some years after, Mr. Justice Best, one of the Judges who decided that case, indulged in some remarks at variance with this decision, but they were uncalled for by the occasion on which they were uttered, and only went to show his private opinion. In the case of the Antelope, 10 Wheaton, it was decided by the Supreme Judicial Court of the United States, that the Spanish claimant should recover the slaves that had been taken from his vessel and which were identified, and the demand of the Portuguese Consul was refused only on the ground that he furnished no evidence that any of the slaves belonged to Portuguese subjects. Thus the slaves were clearly recognized as legal property. The claimant of such property may not, in the opinion of some, have a moral right to hold it, but the question here to be settled is, not what a moralist would say of the claim, but what is the law?

In a court of law the morality of an act is to be judged of by a legal standard. So say Sir Wm. Scott, and Ch. J. Marshall. Is it immoral, then, judging by such standard, to send this child back to Louisiana? In the case of the Commonwealth v. Griffith,(1) it was decided that in the case of a fugitive slave, this court are to give a certificate to enable the master to take back his property. Is that to be considered immoral, which the court is bound to assist in doing?

(1) 2 Pick. Rep. 11.

The junior counsel relies on the constitution of Massachusetts, which asserts that all men are born free and equal. Suppose it to be true that under this constitution it was illegal to hold slaves, yet a change has since been made by the adoption of the constitution of the United States, and it is not for us now to denounce as legally immoral, a practice which is permitted and sanctioned by the supreme law of the land. But it is said the United States constitution was a compromise. True. There was a compromise as to the mode of raising the revenue, and as to the ratio of representation, &c., and notwithstanding the alleged immorality of slavery, we all accede to a compact by which slaves are allowed to be represented. The law of Massachusetts was changed by that instrument, so that even

if according to our law, slavery were immoral before 1789, it is not so now. Admitting that slavery was abolished in Massachusetts in 1770, the conclusion is not affected by the admission.

It is said there can be no reciprocity in this matter between us and the north, for we have no slaves, and therefore Louisiana cannot return the favor here asked. It is true that the favor cannot be reciprocated exactly in kind, but there may be cases in which the courts of Louisiana may be called on to aid a citizen of Massachusetts, as in reclaiming a fugitive wife or son, or in seizing a party for whom he was bail. Could the courts there say in such a case, that they had in Louisiana, no law of the kind sought to be enforced, and so there could be no reciprocity, and on that ground refuse their assistance? It may be said that in the case of a wife or the principal in a bail bond, a contract exists, but there is no contract in the case of a son.

As to the case of the slaves cast upon the Bermudas and set free by the courts of that island, it is said that their emancipation has been submitted to without remonstrance on the part of our goverment. How do we know that? How should we learn it, if remonstrances had been made? Are diplomatic measures sounded with a trumpet through the land? But we do not know the circumstances of that occurrence except by public rumor. If the facts are as rumor has reported them, it was a most extraordinary act—that 33 the property of a friendly nation, cast on shore by a storm, should be forcibly taken away from the owners. The books are full of cases of every other species of property, in which it has been held that, so circumstanced, it should not be confiscated. The case in the 10th Wheaton, is exactly like the Bermuda case, and the courts of the United States restored the property to the owners. So that the Bermuda law, if rightly reported, conflicts with ours.

We have been reminded of the southern laws, by which colored cooks, seamen, &c. on board our ships coming into the ports of slave States, are imprisoned. But their laws have been adjudged unconstitutional and void. Mr. Justice Johnson, one of the Judges of the Supreme Court, liberated those who were imprisoned under these laws, and the laws

themselves have since been altered. No instance of such imprisonment, we believe has occurred since Judge Johnson's decision, and probably no more will occur.

[Putnam J. I know of one instance which has occurred within three or four years, at Charleston.]

It is said that there is no room for comity, where the subject has been made a matter of express regulation, and that the express provision in the constitution as to one case, excludes all others. But we think there was a good reason for inserting that provision, which does not extend to this case. That was to meet a case, in which the active interposition of the court, was required. Here we do not ask any interposition of the court, except to leave the individual just where it finds him. This we think a sufficient answer to the remark that comity does not apply, because the subject has been one of express regulation. In the case in Barnwell and Creswall before cited, this same distinction was taken, between making the law of England *active,* and leaving it *passive.*

It is said the court may be called upon to justify polygamy or infanticide, if it should be decided that the *lex loci* should prevail. We reply that it has power to say that the *lex loci* which permits crimes, shall not prevail here.

In the case cited on the other side, from the 2. Barnwell and Creswall, the court rely on the fact that the Plaintiff was a British subject.

[Loring.—We do not so understand it. Forbes was considered for the purpose of that case, a Spanish subject.]

Curtis proceeded. It is said the practice of slavery is corrupting in its influence on public morals. But the practice of bringing slaves here, was much more common thirty years ago, than now. If this practice be so corrupting, why is it tolerated in other States? Does its corrupting influence stop at the line of Rhode Island, where the slaveholders congregate every summer in considerable numbers? The law of New York allows even foreigners to

go there with their slaves; and have the morals of that State suffered in consequence? In Pennsylvania, too, the law is similar, but where is the evidence of its pernicious influence there? If the supposition be correct, however, it is merely an argument to be addressed to those who are to *change* the law, not to this court, whose sole business is to *declare* it.

Buchell's case has been introduced on the other side. That was an application for a certificate, and was refused because the master had voluntarily brought the slave to a free State, and therefore he was not a fugitive. So of the case in 2. Sergeant and Rawle, 305. The mother was restored to the claimant, but the child having been born in Pennsylvania, was held not to be a fugitive. In both those cases, the *active* interposition of the court was claimed.

Suppose it is decided that the master may take his slaves back with him, is it not for their advantage to be brought here? May not the master be benefited by coming here, and is not the chance to escape, which coming here offers, a benefit to the slave? In fact, many have availed themselves of this chance, to obtain freedom.

It is asked how long a slaveholder may remain here, and retain his power to carry back his slaves on his return? We answer, until by remaining, he acquires a domicil here. If this is not precise enough, let the legislature fix the time, as other free States have done.

It is said, that it was decided in Sommersett's case, that when slavery is abolished, the doctrine of comity ceases as to it. Hargrave does indeed so argue, but there is nothing in Lord Mansfield's opinion, to that effect. That case did not present the question of *comity.* It was a case in an English court, of a British subject claiming a right to own a slave. Where is the comity of nations between England and her colony? As in a question as to the custom of London or the custom of Kent, the court might listen to the *lex loci,* but not to considerations of comity.

It is asserted that Sommersett's case became the law here. If so, why did it not also become law in all the other colonies—in New York, New Jersey, Pennsylvania,

Connecticut, Rhode Island? Yet all those States have had slaves long since Sommersett's case, and without regard to Lord Mansfield's decision. It is asked, if what is not permitted to our own citizens, shall be allowed to those of other States? We permit strangers to make contracts which we might not permit to our own citizens. Among others, we allow them to contract for greater rates of interest of money than we permit in contracts made here, and our courts enforce such engagements.

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We do not deny that our legislature could declare it unlawful to bring slaves here. But till they do so, we have only to take the law as it is. Our law, since the constitution of the United States, stands on different grounds from what it did before that compact; the *people* of Massachusetts have recognized rights in the citizens of other States changing materially our relations.

It is said that though the members of the convention from the free States, who assisted in framing the constitution, might have been willing to allow fugitive slaves to be taken away from those States, yet they might not be willing to let the master bring his slaves into these States voluntarily, and use them here. We do not, in this case, claim any other right than that of needful restraint here, and *in itinere,* and as to the right to using them, notwithstanding the supposed horror at such an admission, the legislatures of New York and Pennsylvania, Rhode Island and New Jersey have actually enacted statutes allowing precisely that very privilege.

OPINION OF THE COURT

August 27, 1836.

Shaw, C.J. —The question now before the Court arises upon a return to a *Habeas Corpus,* originally issued in vacation, by Mr. Justice Wilde, for the purpose of bringing up the person of a colored child named Med, and instituting a legal inquiry into the fact of her detention,and the causes for which she was detained. By the provisions of the revised

code, the practice upon *habeas corpus* is somewhat altered. In case the party complaining or in behalf of whom complaint is made, on the ground of unlawful imprisonment, is not in the custody of an officer, as of a Sheriff or deputy, or corresponding officer of the U S the writ is directed to the Sheriff, requiring him or his deputy to take the body of the person thus complaining, or in behalf of whom complaint is thus made, and have him before the court or magistrate issuing the writ, and to summon the party alleged to have or claim the custody of such person, to appear at the same time, and show the cause of the detention. The person thus summoned is to make a statement under oath, setting forth all the facts fully and particularly; and in case he claims the custody of such party, the grounds of such claim must be fully set forth. This statement is in the nature of a return to the writ, as made under the former practice, and will usually present the material facts upon which the questions arise. Such return, however, is not conclusive of the facts stated in it, but the court is to proceed and inquire into all the alleged causes of detention, and decide upon them in a summary manner. But the court may, if occasion require it, adjourn the examination, and in the meantime bail the party, or commit him to a general or special custody, as the age, health, sex, and other circumstances of the case may require. It is further provided that when the writ is issued by one Judge of the court in vacation, and in the meantime, before a final decision, the Court Shall meet in the same county, the proceedings may be adjourned into the court, and there be conducted to a final issue, in the same manner as if they had been originally commenced by a writ issued from the court. I have stated these provisions the mote minutely, because there have been as yet but few proceedings under the revised statutes, and the practice is vet to ba established.

Upon the return of this writ before Mr. Justice Wilde, a statement was made by Mr. Ayes, the respondent; the case was then postponed. It has since been fully and very ably argued before all the Judges, and is now transferral to and entered in court, and stands here for judgment, in the same manner as if the writ had been originally returnable in court.

The return of Mr. Ayes states that he has the body of the colored child described in his custody, and produces her. It further states that Samuel Sister, a merchant, citizen and

resident in the city of New Orleans and Slate of Louisiana, purchased the child with her mother in 1833, the mother and child being then and long before slaves by the laws of Louisiana; that they continued to be his property, in his service, at New Orleans, till about the first of May last, when Mary Slater his wife, the daughter of Mr. Ayes, left New Orleans for Boston, for the purpose of visiting her father intending to return to New Orleans after an absence of four or five months; that the mother of the child remained at New Orleans in a state of slavery, but that Mrs. Sister brought the child with her front New Orleans to Boston, having the child in her custody as the agent and representative of her husband, whose slave the child was, by the laws of Louisiana, when the child was brought thence; the object, intent and purpose of the said Mary Slater being to have the said child accompany her, and remain in her custody, and under her care during her temporary absence from New Orleans, and that the said child should return with her to New Orleans, the domicil of herself and her husband; that the said child was confided to the custody and care of said Ayes by Mrs. Sister, during her temporary absence in the country for her health. The respondent con. eludes by stating that he has exercised no other restraint over the liberty of this child than such as was necessary to the health and safety of the child. Notice having been given to Mr. and Mrs. Sister, an appearance has been entered for them, and in this state of the case and of the parties, the cause has been heard. Some evidence was given at the former hearing, but it does not materially vary the facts stated in the return. The fact testified which was considered most material was, the declared intent of Airs. Slater to take the child back to New Orleans. But as that intent is distinctly avowed in the return, that is, to take the child back to New Orleans, if it could be lawfully done, it does not essentially change the case made by the return.

This return is now to be considered in the same aspect as if made by Mr. Slater. It is made in fact by Mr. Ayes, claiming the custody of the slave in right of Mr. Slater, and that claim is sanctioned by Mr. Slater, who appears by his attorney to maintain and enforce it. He claims to have the child as master, and carry her back renew Orleans, and whether

the claim has been made in terms or not to hold and return her as a slave, that intent is manifest, and the argument has very properly placed the claim upon that ground.

The case presents an extremely interesting question, not so much on account of any doubt or difficulty attending it, as on account of its important consequences to those who may be affected by it, either as masters or slaves.

The precise question presented by the claim of the respondent is, whether a citizen or any one of the United States, where negro slavery is established by law, coming into this State, for any temporary purpose of business or pleasure, staying some time, but not acquiring a domicil here, who brings a slave with him as a personal attendant, may restrain such slave of his liberty during his continuance here, and convey him out of this State on his return, against his consent. It is not contended that a master can exercise here any other of the rights of a slave owner, than such as may be necessary to retain the custody of the slave during his residence, and to remove him on his return.

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Until this discussion, I had supposed that there had been adjudged cases on this subject in this Commonwealth; and it is believed to have been a prevalent opinion among lawyers, that if a slave is brought voluntarily and unnecessarily within the limits of this state, he becomes free, if he chooses to avail himself of the provisions of our laws; not so much because his coming within our territorial limits, breathing our air, or treading on our soil, works any alteration in his *status,* or condition, as settled by the law of his domicil, as because by the operation of our laws, there is no authority on the part of the master, either to restrain the slave of his liberty, whilst here, or forcibly to take him into custody in order to his removal. There seems, however, to be no decided case on the subject, reported.

It is now to be considered as an established rule, that by the constitution and laws of this Commonwealth, before the adoption of the Constitution of the United States, in 1789, slavery was abolished, as being contrary to the principles of justice, and of nature, and

repugnant to the provisions of the Declaration of Rights, which is a component part of the constitution of the State.

It is not easy, without more time for historical research than I now have, to show the course of slavery in Massachusetts. By a very early Colonial Ordinance, (1641) it was ordered, that there should be no bond slavery, villenage, or captivity amongst us, with the exception of lawful captives taken in just wars, or those judicially sentenced to servitude, as a punishment for crime. And by an act a few years after, (1646) manifestly alluding to some transaction then recent, the General Court conceiving themselves bound to bear witness against the heinous and crying sin of man stealing, &c., ordered that certain negroes be sent back to their native country (Guinea) at the charge of the country, with a letter from the Governor expressive of the indignation ef the Court thereabouts. See Ancient Charters, &c. 52, chap. 12, sections 2, 3.

But notwithstanding these strong expressions in the acts of the Colonial Government, slavery to a certain extent seems to have crept in; not probably by force of any law, for none such is found or known to exist; but rather, it may be presumed, from that universal custom, prevailing through the European colonies, in the West Indies, and on the continent of America, and which was fostered and encouraged by the commercial policy of the parent states. That it was so established, is shown by this, that by several provincial acts, passed at various times, in the early part of the last century, slavery was recognized as existing in fact, and various regulations were prescribed in reference to it.—The act passed June, 1703, imposed certain restrictions upon manumission, and subjected the master to the relief and support of the slaves, notwithstanding such manumission, if the regulations were not complied with. The act of October, 1705, levied a duty and imposed various restrictions upon the importation of negroes, and allowed a drawback upon any negro, thus imported and for whom the duty had been paid, if exported within the space of twelve months and *bona fide* sold in any other plantation.

How, or by what act particularly, slavery was abolished in Massachusetts, whether by the adoption of the opinion in Sommersett's case, as a declaration and modification of the common law, or by the Declaration of Independence, or by the Constitution of 1780, it is not now very easy to determine, and it is rather a matter of curiosity than of utility; it being agreed on all hands that if not abolished before, it was so by the declaration of rights. In the case of *Winchendon* vs. *Hatfield,* 4 Mass. R. 123, which was a case between two towns respecting the support of a pauper, Chief Justice Parsons, in giving the opinion of the court, states, that at the first action which came before the court after the establishment of the constitution, the judges declared, that by virtue of the declaration of rights, slavery in this state was no more. And he mentions another case, *Littleton* vs. *Tuttle,* 4 Mass. R. 128, note, in which was stated as the unanimous opinion of the court, that a negro born within the State, before the constitution, was born free, though born of a female slave. The chief justice, however, states, that the general practice and common usage have been opposed to this opinion.

It has recently been stated as a fact, that there were judicial decisions in this state prior to the adoption of the present constitution, holding that negroes born here of slave parents were free. A fact is stated in the above opinion of Chief Justice Parsons, which may account for this suggestion. He states that several negroes, born in this country, of imported slaves, had demanded their freedom of their masters by suits of law, and obtained it by a judgment of court. The defence of the master, he says, was faintly made, for such was the temper of the times, that a restless, discontented slave was worth little, and when his freedom was obtained in a course of legal proceedings, his master was not holden for his support, if he became poor. It is very probable, therefore, that this surmise is correct, and that records of judgments to this effect may be found; but they would throw very little light on the subject.

Without pursuing this inquiry farther, it is sufficient for the purposes of the case before us, that by the constitution adopted in 1780, slavery was abolished in Massachusetts, upon

the ground that it is contrary to natural right and the plain principles of justice. The terms of the first article of the declaration of rights are plain and explicit. ‘All men are born free and equal, and have certain natural, essential and unalienable rights, among which are, the right of enjoying and defending their lives and liberties, that of acquiring, possessing and protecting property.’ It would be difficult to select words more precisely adapted to the abolition of negro slavery. According to the laws prevailing in all the states, where slavery is upheld, the child of a slave is not deemed to be born free, a slave has no right to enjoy and defend his own liberty, or to acquire, possess, or protect property. That the description was broad enough in its terms to embrace negroes, and that it was intended by the framers of the constitution to embrace them, is proved by the earliest contemporaneous construction, by an unbroken series of judicial decisions, and by a uniform practice from the adoption of the constitution to the present time. The whole tenor of our policy, of our legislation and jurisprudence from that time to the present, has been consistent with this construction, and with no other.

Such being the general rule of law, it becomes necessary to inquire how far it is modified or controlled in its operation; either,

1. By the law of other nations and states, as admitted by the comity of nations to have a limited operation within a particular state; or

2. By the constitution and laws of the United States.

In considering the first, we may assume that the law of this state is analogous to the law of England, in this respect; that while slavery is considered as unlawful and inadmissible in both, and this because contrary to natural right and to laws designed for the security of personal liberty, yet in both, the existence of slavery in other countries is recognised, and the claims of foreigners, growing out of that condition, are to a certain extent, respected. Almost the only reason assigned by Lord Mansfield in Sommersett's case was, that slavery is of such a nature that it is incapable of being introduced on any reasons moral or political

but only by positive law; and, it is so odious, that nothing can be suffered to support it but positive law.

The same doctrine is clearly stated in the full and able opinion of Marshall C. J., in the case of the Antelope, 10 Wheat, 120. He is speaking of the slave trade, but the remark itself shows that it applies to the state of slavery. ‘That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor, is generally admitted, and that no other person can rightfully deprive him of those fruits, and appropriate 37 them against his will seems to be the necessary result of the admission.’

But although slavery and the slave trade are deemed contrary to natural right, yet it is settled by the judicial decisions of this country and of England, that it is not contrary to the law of nations. The authorities are cited in the case of the Antelope, and that case is itself authority directly in point. The consequence is, that each independent community, in its intercourse with every other, is bound to act on the principle, that such other country has a full and perfect authority to make such laws for the government of its own subjects, as its own judgment shall dictate and its own conscience approve, provided the same are consistent with the law of nations; and no independent community has any right to interfere with the acts or conduct of another state, within the territories of such state, of on the high seas, which each has an equal right to use and occupy and that each sovereign state, governed by its own Jaws, although competent and well authorized to make such laws as it may think most expedient to the extent of its own territorial limits, and for the government of its own subjects, yet beyond those limits, and over those who are not her own subjects, has no authority to enforce her own laws. or to treat the laws of other states as void, although contrary to ha own views of morality.

This view seems consistent with most of the leading cases on the subject.

Sommersett's case, 20 Howell's State Trials 1, as already cited, decides that slavery, being odious and against natural right, cannot exist, except by three of positive law. But it

clearly admits, that it may exist by force of positive law. And it may be remarked, that by positive law in this connection may be as well understood customary law as the enactment of a statute; and the word is used to designate rules established by tacit acquiescence or by the legislative act of any state, and which derive their three and authority from such acquiescence or enactment, and not because they are the dictates of natural justice, and as such of universal obligation.

The Louis, 2 Dodson's R. 238. This was an elaborate opinion of Sir Wm. Scott. It was the case of a French vessel seized by an English vessel in time of peace, whilst engaged in the slave trade. It proceeded upon the ground that a right of visitation by the vessels of erie nation, of the vessels of another, could only be exercised in time of war, or against pirates, and that the slave trade was not piracy by the laws of nations, except against those by whose government it has been so declared by law or by treaty. And the vessel was delivered up.

The Amedie, I Acton's R. 240. The judgment of Sir Win. Grant in this case, upon the point on which the case was decided, that of the burden of proof, has been doubted. But upon the point now under discussion, he says, but we do not lay down as a general principle, that this is a trade which cannot, abstractedly spending, he said to have a legitimate existence. I say abstractedly speaking, because we cannot legislate for other countries; nor has this country a right In control any foreign legislature that may give permission to its subjects, to prosecute this trade. He however held, in consequence of the principles declared by the British government that he was bound to hold *prima facie,* that the traffic was unlawful, and threw on the claimant the burden of proof, that the traffic was permitted by the law of his own country.

The Diana, 1, Dodson, 95. This case strongly corroborates the general principle that though the slave trade is contrary to the principles of justice and humanity, it cannot with truth be said that it is contrary to the laws of all civilized nations; and that courts will

respect the property of persons engaged in it, under the sanction of the law of their on country.

Two cases are cited from the decisions of courts of common law, which throw much light spun the subject.

Madrazo vs. *Willis,* 3 B. and Ald. 353. It was an action brought by a Spaniard against a British subject, who had unlawfully and without justifiable cause, captured a ship with three hundred slaves on board. The only question was the amount of damages. Abbott G. J., who tried the cause, in reference to the very strong language of the acts of Parliament, declaring the traffic in slaves a violation of right and contrary to the first principles of justice and humanity, doubted whether the owner could recover damages, in an English Court of Justice, for the value of the slaves as property, and directed the ship and the slaves to be separately valued. On further consideration he and the whole court were of opinion, that the plaintiff was entitled to recover for the value of the slaves. That opinion went upon the ground that the traffic in slaves, however wrong in itself, if prosecuted by a Spaniard between Spain and the coast of Africa, and if permitted by the laws of Spain, and not restrained by treaty, could not be lawfully interrupted by a British subject, on the high seas, the common highway of nations. And Mr. Justice Bayley in his opinion, after stating the general rule that a foreigner is entitled, in a British court of justice, to compensation for a wrongful act, added, that although the language used by the statutes was very strong, yet it could only apply to British subjects. It is true, he further says, that if this were a trade contrary to the laws of nations, a foreigner could not maintain tiffs action. And Best J. spoke strongly to the same effect, adding that the statutes speak in just terms of indignation of the horrible traffic in human beings, but they speak only in the name of the British nation. If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is impossible to say that the slave trade is contrary to what may be called the common law of nations.

Forbes vs. *Cochrane,* 2 Barn. & Cressw. 448. 3 Dowl.& Ryl. 679. This case has been supposed to conflict with the one last cited; but I apprehend, in considering the principles upon which they were decided, they will be found to be perfectly reconcilable. The plaintiff a British subject, domiciled in East Florida, where slavery wan established by law, was the owner of a plantation, and of certain slaves, who escaped thence and got on board a British ship of war on the high seas. It was held that he could not maintain an action against the master of the ship for harboring the slaves after notice and demand of them. Some of the opinions given in this case are extremely instructive and applicable to the present. Holroyd J., in giving his opinion, said, that the plaintiff could not found his claim to the slaves upon any general right, because by the English laws, such a right cannot be considered as warranted by the general law of nature, that if the plaintiff could claim at all, it must be in virtue of some right, which he had acquired by the law of the country where he was domiciled, that when such rights are recognized by law, they must be considered as founded, not upon the law of nature, but upon the particular law of that country, and must be co-extensive with the territories of that state; that if such right were violated by a British subject, within such territory, the party grieved would be entitled to a remedy, but that the law of slavery is a law *in invitum,* and when a party gets out of the territory, where it prevails, and under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal Jaw of the place only, does not continue. So in speaking of the effect of bringing a slave into England, he says, he ceases to be a slave in England, only because there is no law, which sanctions his detention in slavery. Best J., declared his opinion to the same effect. Slavery is a local law, therefore if a man wishes to preserve his slaves, let them at attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits, where slavery is recognized by the local law. they have broken, their chains —they barn escaped from their prison, and are free.

That slavery is a relation founded in force, not in right, existing, where it does exist, by force Of positive law, and not recognized as founded in natural right, is intimated by the

definition of slavery in the civil law; ‘ *Servitus* 38 *est constitutio juris gentium, qua quis dominio alieno centre naturam subjicitur.* ’

Upon a general review of the authorities, and upon an application of the well established principles upon this subject, we think they fully maintain the point stated, that though slavery is contrary to natural right, to the principles of justice, humanity and sound policy, as we adopt them and found our own laws upon them, yet not being contrary to the laws of nations, if any other state or community see fit to establish and continue slavery by law, so far as the legislative power of that country extends, we are bound to take notice of the existence of those laws, and we are not at liberty to declare and held an act done within those limits, unlawful and void, upon our views of morality and policy, which the sovereign and legislative power of the place, has pronounced to be lawful. If therefore an unwarranted interference and wrong is done by our citizens to a foreigner, acting under the sanction of such laws, and within their proper limits, that is within the local limits of the power by whom they are thus established, or on the high seas, which each and every nation lies a right in common with all others to occupy, our laws would no doubt afford a remedy against the wrong done. So in pursuance of a well known maxim, that in the construction of contracts, the *lex loci contractus* shall govern, if a person, having in other respects, a right to sue in our courts, shall bring an action against another, liable in other respects to be sued in our courts, upon a contract made upon the subject of slavery in a state where slavery is allowed by law, the law here would give it effect. As if a note of hand made in New Orleans were sued on here, and the defence should be that it was on a bad consideration, or, without consideration, because given far the price of a slave sold, it may well be admitted that such a defence could not prevail, because the contract was a legal one by the law of the place where it was made.

This view of the law applicable to slavery, marks strongly the distinction between the relation of master and slave as established by the local law of particular Slates, and in virtue of that sovereign pay, or and independent authority, which each independent State concedes to every other, and those natural and social relations, which are every where

a and by a people recognized and which, though they may be modified and regulated by municipal law, are not founded upon it, such as the relation of parent and child and husband and wife. Such also is the principle upon which the general right of property is founded, being in some form universally recognized as a natural right, independently of municipal law.

This affords an answer to the argument drawn from the maxim, that the right of personal property follows the person, and therefore, Where by the law of a place, a person there domiciled acquires personal property, by the comity of nations, the same must he deemed his property every where. It is obvious, that if this were tree, in the extent in which the argument employs it if slavery exists any where, and if by the laws of any place a property can be acquired in slaves, the law of slavery must extend to every place where such slaves may be carried. The maxim therefore and the argument can apply only to those commodities which are every where and by all nations, treated and deemed subjects of property. But it is not speaking with strict accuracy to say, that a property can be acquired in human beings, by local laws. Each State may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattels shall be deemed to apply to them; as Tar instance, that they may be bought ant sold, delivered, attached, levied upon, that trespass will lie for an injury done to them, or trover for converting them. But it would be a perversion of terms to say, that such local laws do in fact make them personal property generally: they can only determine, that the same rules of law shall apply to them as are applicable to property, and this effect will follow only so far as such laws *proprio vigore* can operate.

The same doctrine is recognized in Louisiana. In the case of *Lunsford* vs *Coquillon,* 14 Martin's Rep. 404, it is thus stated;—The relation of owner and slave in the States of this Union, in which it has a legal existence, is a creature of the municipal law. See Story's Conflict of Laws, 92, 97.

The same principle is declared by the Court in Kentucky, in the case of *Rankin* vs. *Lydia,* 3 Marshall, 470, They say, slavery is sanctioned by the laws of this State; but we consider this as a right existing by positive law of a municipal character, without foundation in the law of nature.

The conclusion to which we come from this view of the law is this:

That by the general and now well established law of this Commonwealth, bond slavery cannot exist, because it is contrary to natural right, and repugnant to numerous provisions of the Constitution and laws, designed to secure the liberty and personal rights of all persons within its limits and entitled to the protection of the laws.

That though by the laws era foreign State, meaning by “foreign” in this connection, a State governed by its own laws, and between which and our own, there is no dependence one upon the other, but which in this respect are as independent as foreign States, a person may acquire a property in a slave, that such acquisition, being contrary to natural right, and effected by the local taw, is dependent upon such local law for its existence and efficacy, and being contrary to the fundamental laws of the State, such general right of property cannot be exercised or recognized here.

That as a general rule, all persons coming within the limits a State, become subject to all its municipal laws, civil and criminal, and entitled to the privileges, which those laws confer; that this rule applies as well to blacks as whites, except the case of fugitives, to be afterwards considered; that if such persons have been slaves, they become free, not so much because any alteration is made in their *status,* or condition, as because there is no law, which will warrant, but there are laws, if they choose to avail themselves of them, which prohibit their forcible detention or forcible removal.

That the law arising from the comity of nations cannot apply; because if it did, it would follow as a necessary consequence, that all those persons who by force of local laws,

and within all foreign places where slavery is permitted, have acquired slaves as property, might bring their slaves here, and exercise over hem the rights and power, which an owner of property might exercise, and for any length of time, short of acquiring a domicile; that such an application of the law would be wholly repugnant to our laws, entirely inconsistent with our policy, and our fundamental principles, and is therefore inadmissible.

Whether if a slave voluntarily brought here and with his own consent returning with his master, would resume his condition as a slave is a question which was incidentally raised in the argument, but is one on which we are not called on to give an opinion in this ease, and we give none. From the principle above stated, on which a slave brought here becomes free, to wit, that he becomes entitled to the protection of our laws, and there is no law to warrant his forcible arrest and removal, it would seem to follow as a necessary conclusion, that if the slave waives the protection of those laws, and returns to the state where he is held as a slave, his condition is not changed.

In the case *Exparte Grace,* 2, Haggard's Ad. R. 94, this question was fully considered by Sir Wm. Scott, in the case of a slave brought from the West Indies to England, and afterwards voluntarily returning to the W. Indies; and he held that she was re-instated in her condition of slavery.

A different decision, I believe, has been made of the question in some of the United States; but for the reasons already given, it is not necessary to consider it further here.

The question has thus far been considered as a general one, and applicable to cases of slaves brought from any foreign state or country; and it now becomes necessary to consider how far this result differs, where the person is claimed as a slave by a citizen of another state of this 39 Union, that is, how the question as between citizens of different states, is affected by the provision of the Constitution and laws of the United States.

In Article 4, See. 2, the Constitution declares that no person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or

regulation thereto, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

The law of Congress made in pursuance of this article provides, that when any person held to labor in any of the United States, &c. shall escape into any other of the said states or territories, the person entitled, &c. is empowered to arrest the fugitive, and upon proof made that the person so seized under the law of the state, from which he or she fled, owes service, &c. Act of Feb 12, 1793.

In regard to these provisions, the Court are of opinion, that as by the general law of this Commonwealth, slavery cannot exist, and the rights and powers of slave owners cannot be exercised therein; the effect of this provision in the constitution and laws of the United States, is to limit and restrain the operation of this general rule, so far as it is done by the plain meaning and obvious intent and import of the language used, and no further. The constitution and law manifestly refer to the case era slave escaping from a state where he owes service or labor, into another state or territory. He is termed a fugitive from labor; the proof to be made is, that he owed service or labor, under the laws of the state or territory *from which he fled,* and the authority given is to remove such fugitive to the state *from which he fled.* This language can, by no reasonable construction, be applied to the case era slave who has not fled from the state, but who has been brought into this state by his master.

The same conclusion will result from a consideration of the well known circumstances under which this constitution was formed. Before the adoption of the constitution, the states were to a certain extent, sovereign and independent, and were in a condition to settle the terms upon which they would form a more perfect union. It has been contended by some over-zealous philanthropists, that such an article in the constitution could be of no binding force or validity, because it was a stipulation contrary to natural right. But it is difficult to perceive the force of this objection. It has already been shown, that slavery is not contrary to the laws of nations. It would then be the proper subject of treaties, among

sovereign and independent powers. Suppose instead of forming the present constitution, or any other confederation, the several slates had be come in all respects sovereign and independent, would it not have been competent for them to stipulate, that fugitive slaves should be mutually restored and, to frame suitable regulations, under which such a stipulation should be carried into effect? Such a stipulation would be highly important and necessary to secure peace and harmony between adjoining nations, and to prevent perpetual collisions and border wars. It would be no encroachment on the rights of the fugitive; for no stranger has a jest claim to the protection of a foreign state against its will, especially where a claim to such protection would be likely to involve the state in war; and each independent state has a right to determine by its own laws and treaties, who may come to reside or seek shelter within its limits. Now the constitution of the United States partakes both of the nature of a treaty and of a form of government. It regards the states, to a certain extent, as sovereign and independent communities, with full power to make their own laws and regulate their domestic policy, and fixes the terms upon which their intercourse with each other shall be conducted. In respect to foreign relations, it regards the people of the states as one community, and constitutes a form of government for them. It is well known that when this constitution was formed, some of the states permitted slavery and the slave trade, and considered them highly essential to their interests, and that some other slates had abolished slavery within their own limits, and from the principles deduced and polity avowed by them, might be presumed to desire to extend such abolition further. It was therefore manifestly the intent and the object of one party to this compact to enlarge, extend and secure as far as possible, the rights and powers of the owners of slaves, within their own limits, as well asia other states, and of the other party to limit and restrain them. Under these circumstances the clause in question was agreed on and introduced into the constitution; and as it was well considered, as it was intended to secure future peace and harmony, and to fix as precisely as language could do it, the limit to which the rights of one party should be exercised within the territory of the other, it is to be presumed that they selected terms intended to express their exact and their whole meaning; and it would be a departure from the purpose and spirit of the compact to put

any other construction upon it than that to be derived from the plain and natural import of the language used. Besides, this construction of the provision in the constitution gives to it a latitude sufficient to afford effectual security to the owners of slaves. The states have a plenary power to make all laws necessary for the regulation of slavery and the rights of slave owners, whilst the slaves remain within their territorial limits; and it is only when they escape, without the consent of their owners, into other states, that they require the aid of other states to enable them to regain their dominion over the fugitives.

But this point is supported by most respectable and unexceptionable authorities.

In the case of Butler vs. Hopper, 1 Wash, C. C. Rep. 499, it was held by Mr. Justice Washington, in terms, that the provision in the constitution which we are now considering, does not extend to the case of a slave voluntarily carried by his master into another state, and there leaving him under the protection of some law declaring him free. In this case, however, the master claimed to hold the slave in virtue of a law of Pennsylvania, which permitted Members of Congress and sojourners, to retain their domestic slaves, and it was held that he did not bring himself within either branch of the exception, because he had, for two years of the period, ceased to be a Member of Congress, and so lost the privilege; and by having become a resident could not claim as a sojourner. The case is an authority to this point, that the claimant of a slave, to avail himself of the provisions of the constitution and laws of the United States, must bring himself within their plain and obvious meaning, and they will not be extended by construction; and that the clause in the constitution is confined to the case of a slave escaping from one state and fleeing to another.

But in a more recent case, the point wan decided by the same eminent judge. *Ex parte Simmons.* 4 Wash. C. C. R. 396. It was an application for a certificate under § 3 of the act of Feb. 12, 1793. He held that both the constitution and laws of the United States apply only to fugitives, escaping from one state, sad fleeing to another, end not to the cage of a slave voluntarily brought by his master.

Another question was made in that case, whether the slave was free by the laws of Pennsylvania, which, like our own in effect, liberate slaves voluntarily brought, within the state, bat there is an exception in favor of Members of Congress, Foreign Ministers and Consuls, and *sojourners:* but this provision is qualified as to costumers end persons passing through the state in such manner as to exclude them from the benefit of the exception, if the slave was retained in the state longer than six months. The slave in that case having been detained in the state more than six months, was therefore held free.

This case is an authority to this point;—the genera rule being, that if slave is brought into a State where the laws do not admit slavery, he will be held free, the person who claims him as a slave, under say exception or limitation of the general rule, must show clearly that the case is within such exception.

The same principle was substantially decided by the state court in the same slate in the case of *Commonwealth* v. *Holloway,* 2 Serg. & Rawle, 305. It was the case of 40 a child of a fugitive slave, born in Pennsylvania. It was held that the constitution of the U. S. was not inconsistent with the law of Pennsylvania; that as the law and constitution of the U. S. did not include the issue of fugitive slaves in terms, it did not embrace them by construction or implication. The court considers the law as applying only to those who *escape.* Yet by the operation of the maxim which obtains in all the states wherein slavery is permitted by law, *partus sequitur ventrem,* the offspring would follow the condition of the mother, if either the rule of comity contended for applied, or if the law of the United States could be extended by construction.

The same decision has been made in Indiana, 3 American Jurist, 404.

In Louisiana, it has been held, that if a person with a slave, goes into a state to reside where it is declared that slavery shall not exist, for ever so short a time, the slave *ipso facto* becomes free, and will be so adjudged and considered afterwards in all other states; and a person moving from Kentucky to Ohio, to reside, his slaves thereby became free,

and were so held in Louisiana. This case also fully recognises the authority of states to make laws dissolving the relation of master and slave; and considers the special limitation of the general power, by the federal constitution, as a forcible implication in proof of the existence of such general power. *Lunsford* v. *Coquillon,* 14 Martin's Rep. 465.

And in the above cited case from Louisiana, it is very significantly remarked, that such a construction of the constitution and law of the United States can work injury to no one, for the principle acts only on the willing and *volenti non fit injuria.*

The same rule of construction is adopted in analogous rues in other countries, that is, where an institution is forbidden, but where for special reasons and to a limited extent such prohibition is relaxed, the exemption is to be construed strictly, and whoever claims the exemption. must show himself clearly within it, and where the facts do not bring the case within the exemption, the general rule has its effect.

By a general law of France, all persons inhabiting or being within the territorial limits of France are free. An edict was passed by Louis XIV. called ‘Le Code Noir,’ respecting slavery in the colonies. In 1716, an edict was published by Louis XV, concerning slavery in the colonies, and reciting among other things, that many of tie colonists were desirous of bringing their slates rote France, to have them confirmed in the principles of religion, and to be instructed in various arts and handicrafts, from which the colonists would derive much benefit, on the return of the slaves, but that many of the colonists eared that their slaves would pretend to be free on their arrival in France, from which their owners would sustain considerable loss, and be deterred from pursuing an object at once so pious and useful. The edict then provides a series of minute regulations to be observed both before their departure from the West Indies, and on their arrival in France, and if all these regulations are strictly complied with, the negroes so brought over to France shall not thereby acquire any right to their freedom, but shall be compellable to return; hut if the owners shall neglect to comply with the prescribed regulations, the negroes shall become free, and the owners shall lose all property in them. 20 Howell's State Trials, 15, note.

The Constitution and laws of the United States, then, are confined to cases of slaves escaping from other states and coming within the limits of this state without the consent and against the will of their masters, and cannot by any sound construction extend to a case where the slave does not escape and does not come within the limits of this state against the will of the master, but by his own act and permission. This provision is to be construed according to its plain terms and import, and cannot he extended beyond this, and where the case is not that of an escape, the general rule shall have its effect. It is upon these grounds, we are of opinion, that an owner of a slave in another state where slavery is warranted by law, voluntarily bringing such slave into this state, has no authority to detain him against his will, or to carry him out of the state against his consent, for the purpose of being held in slavery.

This opinion is not to be considered as extending to a case, where the owner eta fugitive slate hayloft produced a certificate according to the law of the United States. is *bona fide* removing such slave to his own domicil, and in so doing passes through a free state; where the law confers a right or favor, by necessary implication it gives fie means of executing it. Nor do we give any opinion upon the case, where an owner of a slave in one state, is *bona fide* removing to another state where slavery is allowed, and in so doing necessarily passes through s free state, or arrives by accident or necessity be is compelled to touch or land therein, remaining no longer than necessary. Our geographical position exempts us from the probable necessity of considering such a case, and we give no opinion respecting it.

The child who is the subject of this *habeas corpus,* being of too tender years to have any will or give any consent to be removed, and her mother, being a slave and having no will of her own and no power to act for her child, she is necessarily left in the custody of the law. The respondent having claimed the custody of the child, in behalf of Mr. and Mrs. Slater, who claim the right to carry her back to Louisiana, to be held in a state of slavery, we are of opinion that his custody is not to be deemed y the Court a proper and lawful custody.

Under a suggestion made in the outset of this inquiry, that a probate guardian would probably he appointed, we shall for the present order the child into temporary custody, to give time for an application to be made to the Judge of Probate.

[The Court were unanimous is the above opinion.]